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# COMPREHENSIVE ECONOMIC SANCTIONS, THE RIGHT TO DEVELOPMENT, AND CONSTITUTIONALLY IMPERMISSIBLE VIOLATIONS OF INTERNATIONAL LAW

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**Abstract:** This Comment examines the legality of the comprehensive unilateral embargo imposed by the United States on Cuba within the framework of international law. It argues that, independent of its humanitarian impact or the dubious legality of its extra-jurisdictional components, the comprehensive embargo violates international law because it undermines Cuba's right to development. International law is, and has always been, a component part of U.S. law—it is enforceable in U.S. courts, it informs judicial interpretation of U.S. statutes, and it guides legislative and executive action in matters of both foreign and domestic policy. In addition to its supplementary interpretive function in our legal system, international law is, through the Supremacy Clause, binding on the United States as a constitutional matter. Because of the role international law plays in the United States, a direct conflict between federal and international law is constitutional anathema. This Comment argues that the tension must be resolved by reference to the substance and timing of the federal enactments that violate international law. Thus, of the coordinate branches, the legislative branch is in the best position to correct the constitutional imbalance. The Comment concludes that Congress must either pass new legislation explicitly renouncing the right to development as an international legal norm, or, in light of the role of international law in our constitutional system, execute faithfully its duty to interpret and uphold the Constitution by repealing the legislation that has created the decades-old embargo.

## INTRODUCTION

Since the 1990s and the experience with the 661 regime in Iraq, a profusion of scholarship and political discourse has decried the use of comprehensive unilateral and multilateral trade sanctions because of the crippling effects such measures have on a target country's popula-

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tion.<sup>1</sup> Consequently, these all-encompassing, blanket sanctions have been almost universally rejected as the economic weapon of choice in international affairs.<sup>2</sup> Both as a member of the U.N. Security Council and in its sovereign capacity, the United States has tacitly recognized the potential violations of international law occasioned by blanket measures.<sup>3</sup> Even with respect to Cuba, a country on which it has maintained a comprehensive embargo despite widespread international opposition, the United States has made "humanitarian" exceptions to its embargo.<sup>4</sup>

Yet the United States's efforts to bring its embargo on Cuba more in line with international human rights and international humanitarian legal norms have missed a critical point: the illegality of the embargo under international law is not predicated exclusively, or even primarily, on its humanitarian impact.<sup>5</sup> This Comment argues that the compre-

<sup>1</sup> See JOY GORDON, *INVISIBLE WAR: THE UNITED STATES AND THE IRAQ SANCTIONS* 32–38 (2010); see also David Cortright & George A. Lopez, *Introduction: Assessing Smart Sanctions: Lessons from the 1990s*, in *TARGETING ECONOMIC STATECRAFT* 1, 1 (David Cortright & George A. Lopez eds., 2002) (affirming that the catastrophic impact of the 661 sanctions in Iraq "cast a long shadow" and prompted a rethinking of the comprehensive sanctions paradigm). The 661 regime was the system of trade sanctions imposed on Iraq by U.N. Security Council Resolution 661. See S.C. Res. 661, ¶¶ 3–6, U.N. Doc. S/RES/661 (Aug. 6, 1990). Invoking the specter of "dual-use," the United States and Great Britain were effectively able to block nearly every type of good required in a modern industrial society from entering Iraq. See GORDON, *supra*, at 61–85. This stunning unilateralism resulted in a major humanitarian disaster and the devolution of Iraq from a first-world country to a pre-industrial state. See *id.*

<sup>2</sup> See Cortright & Lopez, *supra* note 1, at 1 (noting that more targeted "smart" sanctions have largely replaced their more expansive precursors, with both the United Nations and the European Union employing, exclusively, selective sanctions since the mid-1990s).

<sup>3</sup> See, e.g., U.N. GAOR, 64th Sess., 27th plen. mtg. at 19–20, U.N. Doc. A/64/PV.27 (Oct. 28, 2009); U.N. GAOR, 63rd Sess., 33rd plen. mtg. at 14–15, U.N. Doc. A/63/PV.33 (Oct. 29, 2008); U.N. GAOR, 62nd Sess., 38th plen. mtg. at 18, U.N. Doc. A/62/PV.38 (Oct. 30, 2007); U.N. GAOR, 61st Sess., 50th plen. mtg. at 6, U.N. Doc. A/61/PV.50 (Nov. 8, 2006).

<sup>4</sup> See Trade Sanctions Reform and Export Enhancement Act of 2000, 22 U.S.C. § 7202 (2006). Specifically, the President may not unilaterally restrict the flow of food or medicine into a sanctioned country. *Id.* As a result of the humanitarian exceptions, the United States is now Cuba's largest supplier of food; the American people are its most significant humanitarian contributor. See U.N. GAOR, 63rd Sess., 33rd plen. mtg., *supra* note 3, at 14–15. But see AMNESTY INT'L, *THE U.S. EMBARGO AGAINST CUBA: ITS IMPACT ON ECONOMIC AND SOCIAL RIGHTS* 15 (2009) (clarifying that, while the easing of restrictions on agricultural exports has mitigated the severity of food shortages in Cuba, the export of medicines and medical equipment remains "severely limited" in practice).

<sup>5</sup> See U.N. GAOR, 63rd Sess., 33rd plen. mtg., *supra* note 3, at 2, 3, 7, 9–11, 13, 15, 18, 20, 23, 25. In denouncing the U.S. embargo of Cuba, a majority of the nations presenting at the General Assembly, including Egypt, Guyana (speaking on behalf of the fourteen member states of the Caribbean Community), Vietnam, China, Algeria, India, Angola, Nicaragua, Tanzania, Cuba, France, Laos, Indonesia, Myanmar, and Belarus, referred to the U.S. embargo's effects on Cuba's right to development as a reason for its illegitimacy

hensive embargo on Cuba could have no negative “humanitarian” consequences whatsoever, and yet it would violate international law because it undermines a nation’s ability to develop.<sup>6</sup>

Because the federal laws and regulations codifying the Cuban embargo conflict directly with U.S. treaty obligations and its duties under customary international law, they are unconstitutional.<sup>7</sup> Until Congress

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under international law. *See id.* Yet, the delegation from the United States completely ignored the issue of development and focused only on humanitarian questions raised by the other countries. *See id.* at 14–15.

<sup>6</sup> *See* U.N. Charter arts. 55–56; Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); International Covenant on Civil and Political Rights, G.A. Res. 2200[B] (XXI), at 52, U.N. GAOR, 21st Sess., 1496th plen. mtg., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200[A] (XXI), at 49, U.N. GAOR, 21st Sess., 1496th plen. mtg., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966); Declaration on the Right to Development, G.A. Res. 41/128, at 186, U.N. GAOR, 41st Sess., 97th plen. mtg., Supp. No. 53, U.N. Doc. A/41/53 (Dec. 4, 1986). Although the right to development certainly implicates other fundamental rights of peoples codified in such instruments as the U.N. Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, those documents, along with the Declaration on the Right to Development, treat the right as a conceptually—and practically—discrete right protected under international law. *See* U.N. Charter arts. 55–56; Universal Declaration of Human Rights, *supra*, arts. 22, 28; International Covenant on Civil and Political Rights, *supra*, art. 1; International Covenant on Economic, Social and Cultural Rights, *supra*, arts. 1, 2(1); Declaration on the Right to Development, *supra*, art. 6. This Comment thus treats the right to the basic necessities of life such as food, potable water, and shelter as conceptually distinct from the right of a nation to develop beyond the capacity only to provide its population with the essentials. *See* U.N. Charter arts. 55–56; Universal Declaration of Human Rights, *supra*, arts. 22, 28; International Covenant on Civil and Political Rights, *supra*, art. 1; International Covenant on Economic, Social and Cultural Rights, *supra*, arts. 1, 2(1); Declaration on the Right to Development, *supra*, art. 8. In this manner, the Comment categorically rejects any argument that the embargo on Cuba is legal under international law because it has not had a cataclysmic humanitarian impact based on such measures as life expectancy or infant mortality. *See* AMNESTY INT’L, *supra* note 4, at 16 (citing a 1997 report by the American Association for World Health, which concluded that a major humanitarian disaster resulting from the trade embargo, such as the one experienced in Iraq under the 661 regime, has been averted in Cuba only because of the Cuban government’s heavy investment in public health).

<sup>7</sup> *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 877 (1987). Just as contradictions between co-equal federal enactments must be resolved under the Constitution, so too must discrepancies between customary international law and federal legislation. *See id.* Although the Supreme Court has never ruled on the point, there is nothing in the text of the Constitution that would preclude the United States from elevating customary international law over regular federal enactments and giving effect to international customary legal norms even in the face of a later congressional enactment. *See id.* Even under a more conservative understanding, a direct conflict between customary international law and a federal enactment is not simply an issue of domestic law versus international commitments—it is a *constitutional* question. *See id.* at 877–78. As Professor Henkin explains,

promulgates new laws that explicitly assert this country's intentions to contravene international law, the courts should strike down any provision of the embargo on Cuba, which affects Cuba's right to develop, as unconstitutional.<sup>8</sup> Alternatively, Congress should more seriously approach its duty to uphold the Constitution, rather than simply relying on the judiciary, by admitting the unconstitutionality of its own enactments and duly repealing the various laws comprising the Cuban embargo.<sup>9</sup> President Barack Obama had an opportunity to demonstrate a renewed commitment to complying with the "law of nations" in September 2009, but he instead chose to stay the course of his predecessors, dating back to Jimmy Carter, and extended the executive's power to implement the embargo.<sup>10</sup> For now, with no meaningful action be-

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Like treaties, customary law has now been declared to be United States law within the meaning of both article III and the supremacy clause. If an act of Congress can modify customary law for domestic purposes, it is not because customary law is like federal common law but rather because, like treaties, customary law is equal in status to legislation, and the more recent of the two governs.

*See id.* at 878 (citation omitted).

<sup>8</sup> *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . ."). It is an accepted jurisprudential principle that the executive and legislative branches may contravene international law, whether codified in treaties to which the United States is a party or existing in customary international law, especially where the branches act in concert (for example, where Congress "approves of a presidential act violative of customary international law"). *See* Michael J. Glennon, *Raising the Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 Nw. U. L. REV. 321, 325 (1985). There are two critical limitations to the ability to violate international law, however, one being substantive and the other temporal. *See Charming Betsy*, 6 U.S. (2 Cranch) at 119. Substantively, an act of Congress or the President must contain a statement, "plainly expressed," that the action is intended to repeal a norm of customary international law. *See id.* Temporally, the presidential or congressional action must come after the signing of a treaty or the development of an international legal norm. *See Whitney v. Robertson*, 124 U.S. 190, 194 (1888); Henkin, *supra* note 7, at 878.

<sup>9</sup> *See* Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 62, 63 (1986) ("[B]oth the structure and text of the Constitution require Congress to determine the constitutionality of proposed enactments. . . . [N]othing in *Marbury* implies that only the courts can interpret the Constitution.").

<sup>10</sup> *See* Continuation of the Exercise of Certain Authorities Under the Trading with the Enemy Act, Determination No. 2009-27, 74 Fed. Reg. 47,431, 47,431 (Sept. 16, 2009); Determination Extending the Exercise of Certain Authorities Under the Trading with the Enemy Act, 43 Fed. Reg. 40,449, 40,449 (Sept. 12, 1978). On September 11, 2009, three days before the executive's powers to impose the Cuban embargo (under the Trading with the Enemy Act (TWEA)) were set to lapse, President Obama issued a memorandum to the Secretary of State and Secretary of the Treasury stating, "I hereby determine that the continuation for 1 year of the exercise of those authorities with respect to Cuba is in the national interest of the United States." *See* Continuation of the Exercise of Certain Authori-

ing taken by the executive and little likelihood of intervention in this contentious political issue by the judiciary, it is up to Congress to “be cognizant of this country’s global leadership position and the need for it to set an example with respect to human rights obligations.”<sup>11</sup>

This Comment will examine the unilateral trade embargo imposed on Cuba by the United States in light of the role of international law in our constitutional system. Part I provides a brief overview of the embargo itself, as it exists in U.S. domestic law. Part II traces the evolution of the right to development as an international legal norm, highlighting its codification in treaty and crystallization as a norm of customary international law. Part III chronicles some of the devastating effects wrought by the all-encompassing nature of the embargo. Specifically, it focuses on the two areas in which international law and international legal norms are implicated: humanitarian consequences and development effects. After situating international law properly within the discussion of U.S. constitutionalism, Part IV demonstrates why the U.S. blockade of Cuba, which conflicts directly with Cuba’s right to development, is unconstitutional in its present form. Finally, Part V provides several options for “re-constitutionalizing” the blockade. It advocates for outright repeal of the legislative enactments codifying the embargo. Though not the only option, this is both the most expedient solution to the constitutional questions posed by the Cuban embargo and the only practical way to promote future compliance with international law.

## I. THE CUBAN BLOCKADE: A BRIEF ACCOUNT OF U.S. DOMESTIC LAW

The legislation and regulations codifying the U.S. embargo of Cuba are paradigmatic of the type of comprehensive unilateral sanctions decried by the international community.<sup>12</sup> Originally imposed through the

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ties Under the Trading with the Enemy Act, 74 Fed. Reg. at 47,431. This was the thirty-second time a president continued his powers under the TWEA with respect to Cuba. *See infra* note 13 and accompanying text.

<sup>11</sup> *See* *Maria v. McElroy*, 68 F. Supp. 2d 206, 231 (E.D.N.Y. 1999).

<sup>12</sup> *See, e.g.*, U.N. GAOR, 64th Sess., 27th plen. mtg., *supra* note 3, at 20 (“[The unilateral Cuban embargo] is a flagrant violation of the provisions of the United Nations Charter, the principles of international law and resolutions adopted year after year by this Assembly . . . .”); The Secretary-General, *Report of the Secretary-General on Unilateral Economic Measures as a Means of Political and Economic Coercion Against Developing Countries*, at 6, *Delivered to the General Assembly*, U.N. Doc. A/64/179 (July 27, 2009) (stating that unilateral sanctions used as instruments of political and economic coercion against developing countries “are contrary to the principles of international law, the sovereign equality of States, non-interference in the internal affairs of States and peaceful coexistence among States”); U.N. GAOR, 63rd Sess., 33rd plen. mtg., *supra* note 3, at 7 (“The United States’ unilateral economic, commercial and financial embargo against Cuba represents a violation of in-

powers granted to the president by the Trading with the Enemy Act (TWEA), the embargo has become increasingly more complex in nature and panoptic in breadth with each successive law and regulation.<sup>13</sup>

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ternational law, including international laws relating to the freedom of trade and navigation and non-interference in the internal affairs of States.”).

<sup>13</sup> See Trading with the Enemy Act (TWEA) of 1917, 50 U.S.C. app. § 5(b) (2006) (granting the President broad authority to control transactions with designated “enemies,” including the ability to investigate, regulate, or prohibit foreign exchange transactions, transfers of credit, payments that involve any banking institution over which the United States has jurisdiction, and the importation or exportation of currency, securities, or precious commodities as well as the ability to wield near absolute control over the property interests, subject to the jurisdiction of the United States, of any foreign country or foreign national covered under the Act); see also Foreign Assistance Act of 1961, 22 U.S.C. § 2370(a)(1) (2006) (excepting Cuba from the provision of any U.S. foreign assistance and granting additional authority to the President to maintain a total embargo on Cuba); Cuban Democracy (Toricelli) Act of 1992, 22 U.S.C. §§ 6001–6010 (extending the embargo to prohibit entry into U.S. ports of ships that have docked in Cuba and allowing the President to impose sanctions on other countries if they do business with Cuba); Cuban Liberty and Democratic Solidarity (LIBERTAD) (Helms-Burton) Act, 22 U.S.C. §§ 6021–6091 (extending further the jurisdictional reach of the embargo to include any person or government doing business with a Cuban enterprise, which either existed prior to January 1, 1959 or is a successor to a business in existence before that date); 31 C.F.R. pt. 515 (2009) (prohibiting an expansive range of economic transactions and providing, generally, for the prohibition of most imports and exports vis-à-vis Cuba). The TWEA is the linchpin in U.S. foreign policy toward Cuba; the congressional delegation of authority to the executive under the TWEA comprises the bulk of the President’s authority to carry out the Cuban embargo. See 50 U.S.C. app. § 5(b); see also 22 U.S.C. § 2370(a)(1) (providing additional authority). This extraordinary grant of authority, most accurately understood as a wartime power, remains vested in the President despite the fact the United States has never engaged in direct hostilities with Cuba. See generally JENNIFER K. ELSEA & RICHARD F. GRIMMETT, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS (2007), available at <http://www.fas.org/sgp/crs/natsec/RL31133.pdf> (detailing the history of U.S. armed conflicts, including conflicts not explicitly authorized by Congress). In 1977, Congress amended the TWEA, curtailing the President’s power to exert control over both domestic and international economic transactions under the auspices of the Act’s national emergencies provision. Robert L. Pacholski, *Regulation Prohibiting Transactions Incident to Travel to, from, or Within Cuba Held Constitutional*, 17 TEX. INT’L L.J. 529, 532–33 (1982). The new law contained a grandfather clause, however, permitting the President to extend, each year for an additional year, the exercise of all TWEA powers relating to national emergencies declared prior to 1977, provided the President believed the extension to be in the “national interest of the United States.” Act of Dec. 28, 1977, Pub. L. No. 95–223, § 101(b), 91 Stat. 1625, 1625 (codified as amended at 50 U.S.C. and 50 U.S.C. app.). In 1978, President Jimmy Carter was the first President to extend executive powers under the TWEA with respect to the Cuban embargo; in September 2009, President Barack Obama became the latest President in an uninterrupted line to do the same. See Determination No. 2009–27, Continuation of the Exercise of Certain Authorities Under the Trading with the Enemy Act, 74 Fed. Reg. 47,431, 47,431 (Sept. 16, 2009); Determination Extending the Exercise of the Exercise of Certain Authorities Under the Trading with the Enemy Act, 43 Fed. Reg. 40,449, 40,449 (Sept. 12, 1978). Peculiarly, the executive’s powers under the TWEA exercised with respect to North Korea, a country that has tested nuclear weapons and intercon-

In its current form, the blockade generally prohibits the export and import of goods and services with Cuba or Cuban entities around the world.<sup>14</sup> The embargo also covers an exceedingly broad range of economic transactions between the United States and Cuba, including transfers of credit, payments, foreign exchange transactions, securities

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tinental ballistic missiles capable of reaching sovereign U.S. soil, were voluntarily terminated in 2008. *See* Termination of the Exercise of Authorities Under the Trading with the Enemy Act with Respect to North Korea, Proclamation No. 8271, 73 Fed. Reg. 36,785, 36,785 (June 27, 2008); *see also* *Making a Splash*, *ECONOMIST*, Apr. 11, 2009, at 22–23 (describing the threat the government of North Korea continues to pose both to its neighbors and to nations further afield such as the United States). Cuba is now the only country upon which the executive is authorized to impose a comprehensive embargo pursuant to the powers under the TWEA. AMNESTY INT’L, *supra* note 4, at 8 n.15.

Additionally, Cuba was designated a state sponsor of terrorism in 1982 pursuant to the authority granted to the Secretary of State to make such determinations by the Foreign Assistance Act, the Arms Export Control Act, and the Export Administration Act. *See* 22 U.S.C. § 2371(a); Arms Export Control Act of 1968, 22 U.S.C. § 2870(d); Export Administration Act (EAA) of 1979, 50 U.S.C. app. § 2405(j); U.S. Dep’t of State, State Sponsors of Terrorism, <http://www.state.gov/s/ct/c14151.htm> (last visited Apr. 20, 2010). Viewing the provisions of these three laws together, the principal additions to the embargo occasioned by the designation as a sponsor of terrorism are “restrictions on U.S. foreign assistance, a ban on the sale and exportation of defense-related goods, controls placed upon dual-use goods, and restrictions upon financial transactions.” Lucien J. Dhooge, *Condemning Khartoum: The Illinois Divestment Act and Foreign Relations*, 43 AM. BUS. L.J. 245, 261 n.104 (2006).

<sup>14</sup> *See* 31 C.F.R. pt. 515 (2009); 15 C.F.R. § 746.1; Terence J. Lau, *Triggering Parent Company Liability Under United States Sanctions Regimes: The Troubling Implications of Prohibiting Approval and Facilitation*, 41 AM. BUS. L.J. 413, 424 (2004). Certainly, its inability to sell to the U.S. market is economically harmful to Cuba, but the economic damage wrought by the regulation of imports from Cuba is considerably less significant, in terms of the country’s development prospects, than that caused by export controls on U.S. goods. *See* The Secretary-General, *Report of the Secretary-General on the Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America Against Cuba*, at 83, *Delivered to the General Assembly*, U.N. Doc. A/63/93 (Aug. 1, 2008) [hereinafter *The Secretary-General*, 2008]. The United States is the closest and most diversified market, yet the embargo prohibits Cuba and Cuban companies from obtaining any goods, services, or technologies produced in the United States, covered under U.S. patents, or containing any components of U.S. origin. The Secretary-General, *Report of the Secretary-General on the Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America Against Cuba*, at 93, *Delivered to the General Assembly*, U.N. Doc. A/64/97 (June 23, 2009) [hereinafter *The Secretary-General*, 2009]. Swept into these categories are a scopic range of “development inputs such as medicines, medical equipment, fertilizers, food supplements, laboratory equipment, agricultural implements, computers, office supplies, vehicles, tools, construction materials, electric generators and other basic equipment.” *Id.* Given that the United States is such a dominant force in such areas as technology, with certain technologies exclusively controlled by U.S.-based companies, it is nearly impossible for Cuba to take advantage of many technological advancements currently driving economic growth and development in other countries. *See* The Secretary-General, *Report of the Secretary-General on the Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America Against Cuba*, at 81, *Delivered to the General Assembly*, U.N. Doc. A/62/92 (Aug. 3, 2007) [hereinafter *The Secretary-General*, 2007].



transactions, and property transfers.<sup>15</sup> Indeed, the types of economic transactions prohibited by the embargo encapsulate virtually every form of economic exchange in modern commerce.<sup>16</sup> As though its unilateral embargo were insufficiently comprehensive, the United States has applied direct sanctions and coercive economic pressure on other state and business entities in order to discourage other trade relationships with Cuba.<sup>17</sup> Thus, by exercising what many commentators would consider illegal extraterritorial jurisdiction, the United States has effectively transformed its blockade of Cuba into a de facto multilateral endeavor.<sup>18</sup>

## II. THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW

The right to development is an inalienable human right intrinsically linked to a peoples' sovereignty.<sup>19</sup> A state's right to development occupies an exalted position in international law; it is protected in several of international law's foundational documents including the U.N. Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights.<sup>20</sup> In addition to the legiti-

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<sup>15</sup> See 31 C.F.R. § 515.201.

<sup>16</sup> See *id.* pt. 515.

<sup>17</sup> See, e.g., 22 U.S.C. § 6003(a) (allowing the President to pressure other countries to restrict credit relations with Cuba, thereby making it more difficult for Cuba to obtain substantial quantities of goods on a non-cash basis); *id.* § 6003(b) (allowing the President to impose sanctions on countries that trade with Cuba); *id.* § 6005(b) (creating an unprecedented six month trade "purgatory" for any ship that docks in a Cuban port); *id.* § 6082(a)(1)(A) (expanding the United States's jurisdictional reach to any "person . . . [who] traffics in property which was confiscated by the Cuban government on or after January 1, 1959"); 50 U.S.C. app. § 2405(a)(6) (allowing the President to curtail diplomatic relations with any country exporting goods or technology to Cuba); 31 C.F.R. § 515.201 (prohibiting payments and transfers of credit *through* any banking institution subject to the jurisdiction of the United States).

<sup>18</sup> See Jeffrey A. Meyer, *Second Thoughts on Secondary Sanctions*, 30 U. PA. J. INT'L L. 905, 907 (2009) (noting the weight of authority considering "secondary" economic sanctions to be illegal under customary international law).

<sup>19</sup> See Declaration on the Right to Development, *supra* note 6, art. 1.

<sup>20</sup> See U.N. Charter arts. 55–56; Universal Declaration of Human Rights, *supra* note 6, art. 28; International Covenant on Civil and Political Rights, *supra* note 6, art. 1; International Covenant on Economic, Social and Cultural Rights, *supra* note 6, art. 1. These foundational documents—often collectively referred to as the International Bill of Human Rights—are more closely associated with the first and second "generations" of international human rights norms, that is, civil and political rights and economic, social, and cultural rights, respectively. See Jack Donnelly, *In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development*, 15 CAL. W. INT'L L.J. 473, 482–83 (1985); Stephen Marks, *The Human Right to Development: Between Rhetoric and Reality*, 17 HARV. HUM. RTS. J. 137, 138 (2004). Under this rubric, the right to development would belong to a third generation of "solidarity rights belonging to peoples and covering global concerns like development,

macy as a principle of international law, which it derives from its inclusion in the International Bill of Human Rights, the right to development has been further entrenched as an international legal norm by later, more specific treaties and resolutions.<sup>21</sup> By the early 1970s, the

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environment, humanitarian assistance, peace, communication, and common heritage.” Marks, *supra*, at 138. Some scholars have therefore argued that the right to development, which is not explicitly mentioned in the International Bill of Human Rights, is not even implicated by the foundational human rights law documents. *See, e.g.*, Donnelly, *supra*, at 482–89 (“If a right to development were enshrined in these documents, as is often claimed, it would indeed be firmly established as a human right in international law. In fact, however, it is not.”). Such views, however, tend to obfuscate substance of international human rights law and over-simplify the process by which international human rights norms develop. *See* Marks, *supra*, at 138. Granted, the International Bill of Human Rights does not explicitly define a human right to development as such, but it provides both the conceptual framework for envisioning a fundamental right to development and the substantive underpinnings of the right. *See* U.N. Charter arts. 55–56; Universal Declaration of Human Rights, *supra* note 6, art. 28; International Covenant on Civil and Political Rights, *supra* note 6, art. 1; International Covenant on Economic, Social and Cultural Rights, *supra* note 6, art. 1; *see also* The Secretary-General, *Report of the Secretary-General on the International Dimensions of the Right to Development as a Human Right in Relation with Other Human Rights Based on International Co-operation, Including the Right to Peace, Taking into Account the Requirements of the New International Economic Order and the Fundamental Human Needs*, ¶¶ 57–63, *Delivered to the General Assembly*, U.N. Doc. E/CN.4/1334 (Jan. 2, 1979) (enumerating the relevant provisions in the various foundational instruments implying and indeed defining the right to development, concluding that “the legal norms relevant to the right to development are to be found primarily in the Charter of the United Nations and the International Bill of Human Rights”).

<sup>21</sup> *See, e.g.*, Declaration on the Right to Development, *supra* note 6, arts. 1–10; Declaration on Social Progress and Development, G.A. Res. 2542 (XXIV), at 49, U.N. GAOR, 24th Sess., 1829th plen. mtg., Supp. No. 30, U.N. Doc. A/7630 (Dec. 11, 1969); Implementation of the Declaration on Social Progress and Development, G.A. Res. 2543 (XXIV), at 53, U.N. GAOR, 24th Sess., 1829th plen. mtg., Supp. No. 30, U.N. Doc. A/7630 (Dec. 11, 1969); *see also* Marks, *supra* note 20, at 138. By operation of treaty, not only are states obligated to refrain from impeding the development of other states, but member states of the United Nations also bear the responsibility of “develop[ing] friendly relations among nations based on respect for . . . self-determination of peoples” and actively “promot[ing] *conditions of economic social progress and development*.” *See* U.N. Charter arts. 1, 55 (emphasis added). These affirmative duties were reiterated and more clearly defined in later instruments such as the Declaration on the Right to Development. *See* Declaration on the Right to Development, *supra* note 6, art. 3. In this Declaration, signatory states further committed themselves to act in accord with the U.N. Charter and to create “national and international conditions favourable to the realization of the right to development,” and “promote a new international economic order based on sovereign equality.” *See id.* Included among the objectives of the Declaration on Social Progress and Development are “[t]he creation of conditions for rapid and sustained social and economic development, particularly in the developing countries,” as well as “[e]quitable sharing of scientific and technological advances by developed and developing countries.” Declaration on Social Progress and Development, *supra*, arts. 12, 13. The responsibility for achieving these goals is placed primarily upon each individual nation state. *See* Declaration on the Right to Development, *supra* note 6, pmbl.; Declaration on Social Progress and Development, *supra*, arts. 14–22. The

right to development was undergoing a more formal, comprehensive articulation in the specific language of human rights.<sup>22</sup> Over the course of the next fourteen years, the right to development was proclaimed in various texts, including regional multilateral instruments.<sup>23</sup> In 1986, the overwhelming majority of nations, acting through the U.N. General Assembly, built upon the foundation laid in the International Bill of Human Rights and certified the right to development as a human right.<sup>24</sup> Since the passage of the Declaration on the Right to Development, the right has become a fixture in the pantheon of internationally-recognized human rights, regularly appearing in such texts as multilateral treaties, declarations of international conferences and summits, annual resolutions of the General Assembly, reports of the Secretary General, and annual reports of the Human Rights Council.<sup>25</sup>

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international community—particularly the more economically and technically advanced countries—are nevertheless expected to provide “technical, financial, and material assistance” to help developing countries achieve “the social objectives of national development plans” as well as “benefit fully from their national resources.” See Declaration on Social Progress and Development, *supra*, art. 23.

<sup>22</sup> See Marks, *supra* note 20, at 138. The first President of the Senegal Supreme Court, Keba M'Baye, is generally credited with precipitating what would become a robust discourse on the right to development in the language of human rights in his Inaugural Address of the Third Teaching Session of the International Institute of Human Rights (a the René Cassin Foundation) in 1972. See Héctor Gros Espiell, *The Right of Development as a Human Right*, 16 TEX. INT'L L.J. 189, 192 (1981); Marks, *supra* note 20, at 138 n.5.

<sup>23</sup> See, e.g., Organization of African Unity, African [Banjul] Charter on Human and People's Rights, arts. 20, 22, 24, June 27, 1981, 1520 U.N.T.S. 217; Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind, G.A. Res. 3384 (XXX), at 86, U.N. GAOR, 30th Sess., 2400th plen. mtg., Supp. No. 34, U.N. Doc. A/Res./3384 (Nov. 10, 1975).

<sup>24</sup> See Declaration on the Right to Development, *supra* note 6. Of the 159 voting members in the General Assembly at the time, 146 countries voted in favor of the Declaration on the Right to Development, 8 abstained, and 4 did not vote. Rapporteur, *Report of the Third Committee on Alternative Approaches and Ways and Means Within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms*, ¶ 8, *Delivered to the General Assembly*, U.N. Doc. A/41/925 (Dec. 1, 1986). The United States cast the sole negative vote. *Id.*

<sup>25</sup> See, e.g., G.A. Res. 63/178, at 1, U.N. Doc. A/RES/63/178 (Mar. 26, 2009) (“[T]he right to development is an inalienable human right . . . .”); Human Rights Council, *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and Secretary-General*, ¶ 35, *Delivered to the General Assembly*, U.N. Doc. A/HRC/13/26 (Dec. 18, 2009) (“The effective realization of the right to development is one of the OHCHR priorities.”); World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 10, U.N. Doc. A/CONF.157/23 (July 12, 1993) [hereinafter *Vienna Declaration*] (“The World Conference on Human Rights reaffirms the right to development . . . as a universal and inalienable right and an integral part of fundamental human rights.”); see also Marks, *supra* note 20, at 139 (noting the ubiquity of references to the right to development in international texts).

Because of its ubiquity and broad-based acceptance by the international community, the right to development has undoubtedly risen to the level of customary international law.<sup>26</sup> The development of norms of customary international law is a fluid, evolutionary process, which is ascertained by reference to the general practice of states rooted in a sense of legal obligation over a period of time.<sup>27</sup> The right to development is clearly traceable in this manner.<sup>28</sup> It has been over sixty years since the foundations of the right were laid in the U.N. Charter and the Universal Declaration of Human Rights, and over forty years since they were strengthened in the International Covenant on Civil and Political Rights

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<sup>26</sup> See Statute of the International Court of Justice, art. 38, *annexed to* U.N. Charter. Article 38 of the Statute of the International Court of Justice, the judicial organ of the United Nations created along with that body in 1945, is the traditional starting point when examining the sources of international law; indeed it is considered the “constitution” of the international community. Henry J. Steiner et al., *Comment on International Dimension of Human Rights Movement*, in HENRY J. STEINER ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 58, 60 (Henry J. Steiner et al. eds., 3d ed. 2007). It lists the following sources of international law:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, art. 38; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 102(2), (3), rep. n.2 (1987) (noting that general acceptance of states and the “general and consistent practice of states,” which takes many forms including “resolutions, declarations, and other statements of principles” by the U.N. General Assembly, form the basis for customary international law); Marks, *supra* note 20, at 138–42, 167 (discussing the recognition of the right to development by a majority of governments in the world, but conceding some of the practical difficulties associated with the right).

<sup>27</sup> See Statute of the International Court of Justice, art. 38; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 102(2) (1987) (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”). Evidence of international law may be gleaned from various authorities, though it is clear that resolutions of universal international organizations such as the U.N. General Assembly are to be accorded *substantial* weight if the majority of states vote in favor. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 103 cmt. c (1987). Moreover, the requirement that a norm be recognized in international law for some *de minimis* period has been significantly limited, if not altogether abandoned, since World War II. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 102 rep. n.2 (1987).

<sup>28</sup> *See* Marks, *supra* note 20, at 358.

and the International Covenant on Economic and Social Rights.<sup>29</sup> It has been thirty-eight years since the right was proposed using the specific language of human rights, twenty-four years since the international community recognized the right in a formal, broad-based multinational instrument, and seventeen years since a consensus involving all governments was reached on the right to development.<sup>30</sup> The right is consistently invoked by states as a rule of international law.<sup>31</sup> Indeed, the right is so fundamental, so inviolable, and so broadly accepted, it may even be properly considered a *jus cogens* norm.<sup>32</sup> States are therefore bound both by treaty and customary international law to respect the fundamental right of other nations to pursue economic and social development in accordance with their own sovereign volition.<sup>33</sup>

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<sup>29</sup> See U.N. Charter arts. 55–56; Universal Declaration of Human Rights, *supra* note 6, art. 28; International Covenant on Civil and Political Rights, *supra* note 6, art. 1; International Covenant on Economic, Social and Cultural Rights, *supra* note 6, art. 1.

<sup>30</sup> See Declaration on the Right to Development, *supra* note 6, arts. 1–10; *Vienna Declaration*, *supra* note 25; *supra* note 22 and accompanying text; see also Marks, *supra* note 20, at 139–40, 151 (observing that even the United States has joined a consensus on the right to development, specifically at the 1993 World Conference on Human Rights in Vienna).

<sup>31</sup> See *supra* note 5 and accompanying text. Moreover, and in accord with section 103 of the *Restatement (Third) of Foreign Relations Law of the U.S.*, the invocation of the right to development by states regularly goes unchallenged. See, e.g., U.N. GAOR, 64th Sess., 27th plen. mtg., *supra* note 3, at 19–20; U.N. GAOR, 63rd Sess., 33rd plen. mtg., *supra* note 3, at 14–15; U.N. GAOR, 62nd Sess., 38th plen. mtg., *supra* note 3, at 18; U.N. GAOR, 61st Sess., 50th plen. mtg., *supra* note 3, at 6. The United States often objects to the manner in which the Cuban embargo is framed by the government of Cuba and other states, but, at least in the context of the annual vote on the necessity of ending the Cuban embargo, it has not yet lodged an objection to the widespread assertion that its blockade violates Cuba's right to development. See, e.g., U.N. GAOR, 64th Sess., 27th plen. mtg., *supra* note 3, at 19–20; U.N. GAOR, 63rd Sess., 33rd plen. mtg., *supra* note 3, at 14–15; U.N. GAOR, 62nd Sess., 38th plen. mtg., *supra* note 3, at 18; U.N. GAOR, 61st Sess., 50th plen. mtg., *supra* note 3, at 6.

<sup>32</sup> See Mohammed Bedjaoui, *The Right to Development*, in *INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS* 1176, 1193 (Mohammed Bedjaoui ed., 1991) (affirming that the right to development “should be regarded as belonging to *jus cogens*”). A *jus cogens* norm is a norm of international law considered so essential that no derogation from it is permitted. *Id.* at 1185. Although there is no precise, authoritative enumeration of these norms, the generally accepted list includes the prohibitions on genocide, slavery, torture, forced disappearance, and prolonged arbitrary detention. See *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S.* § 702 (1987); see also Bedjaoui, *supra*, at 1183 (arguing that “[i]f the right to development does not . . . belong to *jus cogens*, it would have to be concluded . . . that genocide . . . is permitted by international law”). It is beyond the scope of this Comment to argue that the right to development has indeed passed into the realm of *jus cogens*; the fact that this conception of the right has been persuasively argued is only offered as additional support for the proposition that the right to development is, at the very least, a norm of customary international law. See Bedjaoui, *supra*, at 1183, 1193.

<sup>33</sup> See *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S.* § 102(1) (1987) (noting that international law becomes binding through international agreements as well as customary international law).

Despite its near-universal acceptance as a legitimate norm of international human rights law, however, the United States remains hostile to the right to development.<sup>34</sup> The United States generally votes against any specific resolutions codifying, promoting, or otherwise invoking the right to development.<sup>35</sup> Relevant, too, is the fact that the United States has signed, but not ratified, the International Covenant on Economic, Social, and Cultural Rights.<sup>36</sup> While it both signed and ratified the International Covenant on Civil and Political Rights, it lodged a reservation declaring the agreement to be non-self-executing.<sup>37</sup>

In no way, however, does the inimical stance the United States has taken toward the right to development relieve it of its international obligations with respect to that right.<sup>38</sup> First, customary international law dictates that, even in the absence of ratification, a state's signature on a treaty obligates it to refrain from activities that might defeat the object and purpose of that instrument.<sup>39</sup> Additionally, an assertion that a

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<sup>34</sup> See Marks, *supra* note 20, at 142.

<sup>35</sup> See *id.* Perhaps the most significant example of U.S. opposition to the right to development came in 1986, when it entered the only vote against the Declaration of the Right to Development. See Rapporteur, *supra* note 24, ¶ 8.

<sup>36</sup> See International Covenant on Economic, Social and Cultural Rights, *supra* note 6; United Nations, United Nations Treaty Collection: [Status of] Multilateral Treaties Deposited with the Secretary-General, <http://treaties.un.org/Pages/ParticipationStatus.aspx> (follow "Chapter IV: Human Rights" hyperlink; then follow "3: International Covenant on Economic, Social and Cultural Rights. New York, 16 December 1966" hyperlink) (last visited Apr. 20, 2010).

<sup>37</sup> International Covenant on Civil and Political Rights, *supra* note 6; United Nations, *supra* note 36. The U.S. Senate's ratification of the International Covenant on Civil and Political Rights was subject to a number of reservations, including "[t]hat the United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing." International Covenant on Civil and Political Rights, *supra* note 6; 138 CONG. REC. 8068, 8071 (1992). A declaration that the treaty is non-self-executing is an assertion that the rights guaranteed under the treaty are not enforceable in U.S. courts absent enabling legislation. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 346–47 (1995). When employed by the United States, a declaration of non-self-execution is "designed to keep its own judges from judging the human rights in the United States by international standards." Louis Henkin, *supra*, at 346; see *United States v. Postal*, 589 F.2d 862, 875 (5th Cir. 1979).

<sup>38</sup> See Vienna Convention on the Law of Treaties art. 38, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 324 cmt. c (1987); Hiram E. Chodosh, *An Interpretive Theory of International Law: The Distinction Between Treaty and Customary Law*, 28 VAND. J. TRANSNAT'L L. 973, 991–92 (1995); Henkin, *supra* note 7, at 877–78.

<sup>39</sup> See Vienna Convention, *supra* note 38, art. 18; see also Natsu Taylor Saito, *U.S. Disregard for International Law in the World War II Internment of Japanese Peruvians—A Case Study*, 40 B.C. L. REV. 275, 314 n.204 (1998) (noting that the United States has not ratified the Vienna Convention, but that the rule stated in Article 18 is "widely-recognized" as a principle of customary international law). Because it has signed the International Covenant on

treaty is not binding, either because a state lodged a declaration of non-self-execution or because the state did not sign and ratify it, is irrelevant when the norm in question is one of customary international law.<sup>40</sup> Regardless of a state's posture vis-à-vis a treaty (for example, as a non-signatory or a party subject to reservations), if that treaty also embodies customary international law, the state is bound.<sup>41</sup> The United States, therefore, is not exempt from its dual responsibilities under treaty and customary international law regarding the right to development.<sup>42</sup>

### III. EFFECTS OF THE EMBARGO

According to the Cuban government, the United States's unilateral embargo of the island nation has resulted in over ninety-six billion dollars in aggregate economic losses since it was imposed nearly fifty years ago.<sup>43</sup> Although the damage wrought on Cuba and its people by the trade embargo can be quantified in monetary terms, this figure does not adequately capture the full cost to the nation of Cuba and its people.<sup>44</sup> The devastation can be measured by the health of the Cuban

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Economic, Social and Cultural Rights, the United States cannot undermine the object and purpose of that document, which includes protecting the right of peoples "freely [to] pursue their economic, social and cultural development." See Vienna Convention, *supra* note 38, art. 18; International Covenant on Economic, Social and Cultural Rights, *supra* note 6, art. 1.

<sup>40</sup> See Vienna Convention, *supra* note 38, art. 38 ("Nothing [in the present Convention related to a treaty's effect on third parties] precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 324 cmt. e (1987) ("This section does not preclude the possibility that an agreement among a large number of parties may give rise to a customary rule of international law binding on non-party states."); Chodosh, *supra* note 38, at 991 (noting that treaties are binding once ratified and conceding that "congressional consent [is arguably not] a prerequisite for customary international law to become binding in the U.S. courts"); Henkin, *supra* note 7, at 877 ("The law of nations, including both treaties and customary international law, is binding on the United States."). Because treaties can become binding on states through the operation of customary international law, declarations that a treaty is non-self-executing are not only nugatory, they are also "against the spirit of the Constitution . . . [and] may be unconstitutional." See Henkin, *supra* note 37, at 346.

<sup>41</sup> See Vienna Convention, *supra* note 38, art. 38; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 324 cmt. e (1987); Chodosh, *supra* note 38, at 991-92; Henkin, *supra* note 7, at 877.

<sup>42</sup> See Vienna Convention, *supra* note 38, art. 38; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 324 cmt. e (1987); Chodosh, *supra* note 38, at 991-92; Henkin, *supra* note 7, at 877.

<sup>43</sup> The Secretary-General, 2009, *supra* note 14, at 23.

<sup>44</sup> See The Secretary-General, *Report of the Secretary-General on the Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America Against Cuba*, at 17, *Delivered to the General Assembly*, U.N. Doc. A/61/132 (Aug. 8, 2006).

people, the state of Cuban infrastructure, and most importantly for the purposes of this Comment, the level of economic development attained versus the country's potential for growth.<sup>45</sup>

### A. Humanitarian Consequences

The destructive impact of comprehensive multilateral trade sanctions, and unilateral sanctions made equally expansive through super-jurisdictional measures, on the humanitarian situation in target states is well-documented.<sup>46</sup> Especially in the last two decades, there has been a growing chorus of disapproval among human rights organizations, scholars, and politicians to end the use of these "blunt instruments" as tools for effecting behavior modification or regime change in target states.<sup>47</sup> In response, sanctioning states have adopted a number of policy initiatives, including the use of so-called "smart" sanctions, to mini-

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<sup>45</sup> See The Secretary-General, 2009, *supra* note 14, at 24–37; The Secretary-General, 2007, *supra* note 14, at 19–37. The Secretary-General has issued similar reports on an annual basis for nearly two decades, since the Cuban government first requested that the General Assembly initiate a yearly vote to end the U.S. blockade of Cuba. See Letter from the Permanent Representative of Cuba to the United Nations to the Secretary-General, U.N. Doc. A/46/193 (Aug. 16, 1991).

<sup>46</sup> See generally GORDON, *supra* note 1 (examining the problems caused by economic sanctions specifically in the context of the 661 Regime); POLITICAL GAIN AND CIVILIAN PAIN: THE HUMANITARIAN IMPACTS OF ECONOMIC SANCTIONS (Thomas G. Weiss et. al. eds., 1997) (reviewing the humanitarian impacts of economic sanctions generally and in specific settings); BRIAN FREDERKING, THE UNITED STATES AND THE SECURITY COUNCIL: COLLECTIVE SECURITY SINCE THE COLD WAR 61–77 (2007) (providing examples of the Security Council's economic sanctions in the post-cold war era and explaining that sanctions that are "too 'tough' are counterproductive"); Joy Gordon, *A Peaceful, Silent, Deadly Remedy: The Ethics of Economic Sanctions*, 13 ETHICS & INT'L AFF. 123 (1999) (examining the "ethical complexities" and problems of economic sanctions); Drew Christiansen & Gerard F. Powers, *Unintended Consequences*, 49 BULL. ATOMIC SCIENTISTS, Nov. 1993, 41 (discussing John Foster Dulles's view after World War I that economic sanctions "tend to harm the innocent" and that sanctions should be imposed in way that avoid "undue hardships and inequities"); David Cortright & Samina Ahmed, *Sanctions: Modify 'em*, 54 BULL. ATOMIC SCIENTISTS, Sept. 1998, 22 ("[I]n general trade sanctions inevitably cause the greatest harm to the most vulnerable."); David Cortright & George A. Lopez, *Economic Sanctions and Human Rights: Part of the Problem or Part of the Solution?*, 1 INT'L J. HUM. RTS., Sept. 1997, 1, 1 (1997).

<sup>47</sup> See, e.g., The Secretary-General, *Report of the Secretary-General on the Work of the Organization*, ¶ 89, *Delivered to the General Assembly*, U.N. Doc. A/52/1 (Sept. 3, 1997) (calling for "less blunt and more effective" sanctions through which the desired political objectives might be achieved with less pernicious humanitarian consequences); Gordon, *supra* note 46, at 141 ("The more complete the sanctions, the more effective they will be, in terms of economic damage. . . . The greater the degree to which the economy is generally undermined, the greater the damage to the civilian population, outside the military and political leadership."); Cortright & Ahmed, *supra* note 46, at 22 ("[S]anctions inevitably cause the greatest harm to the most vulnerable.").



mize the humanitarian impact of economic sanctions on civilian populations.<sup>48</sup>

To date, however, the calamitous humanitarian impact of the comprehensive embargo on Cuba has not caused the United States to align its policy with the general international consensus condemning such sweeping measures, and the humanitarian situation in Cuba continues to deteriorate.<sup>49</sup> What this means in terms of the legality of the embargo under international humanitarian law and international human rights law is beyond the scope of this discussion.<sup>50</sup> The humanitarian questions raised by the embargo comprise a critical part of the whole picture that emerges; to the extent these issues are not the focus of this discussion is only to spotlight the topic of development.<sup>51</sup>

### B. *Impact on Development*

The manner in which the embargo impacts the humanitarian situation in Cuba, and the nature of those effects, is linked with the concept of development.<sup>52</sup> It is nevertheless possible to parse out the violations of international law related to the humanitarian consequences of the embargo and the violations of international law related

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<sup>48</sup> See Cortright & Lopez, *supra* note 1, at 1, 6. The idea of smart sanctions emerged during the 1990s in response to the unmitigated, panoptic damage inflicted on target states by comprehensive sanctions regimes, which necessarily affected—often disproportionately so—innocent sectors of the population. See *id.* at 1. The concept of smart sanctions is fairly broad and encompasses measures imposed on a state, which “target” the political establishment in ways that (attempt to) minimize the negative humanitarian impact on the general population. See *id.* at 11–15. In addition to shifting its coercive economic strategies toward the use of smart sanctions since the 1990s, the U.N. Security Council has attempted to mitigate the destructive humanitarian impact of trade sanctions by providing for humanitarian exemptions from comprehensive sanctions regimes, as well as requesting periodic appraisals of the overall impact of sanctions on the people of target nations. JEREMY MATAM FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW 141 (2007).

<sup>49</sup> See AMNESTY INT’L, *supra* note 4, at 16–19.

<sup>50</sup> See discussion *infra* Part III.B. Not only is harming the civilian population of the sanctioned state ethically opprobrious, but it may also be illegal under international law. See AMNESTY INT’L, *supra* note 4, at 13–21 (providing a clear, concise exposition of this position, which is gaining force in the international community). Although it deals specifically with Cuba, the Amnesty International article may be read to stand for the broader proposition that any sanctions regime or embargo, which has a substantial negative impact on the health of the target state’s populace, is per se illegal under international law. See *id.*

<sup>51</sup> See discussion *infra* Part III.B.

<sup>52</sup> See AMNESTY INT’L, *supra* note 4, at 19 (noting, for example, the difficulties in treating conditions such as HIV in the absence of a more highly developed infrastructure and without more advanced medical equipment).

to the impact of the embargo on Cuba's national development.<sup>53</sup> Assuming, *arguendo*, that the United States could maintain its embargo with absolutely no ill humanitarian effects on the Cuban *people* (for example, if the people had access to quality healthcare, food, and potable water), the blockade would still prevent the Cuban *nation-state* from transforming from a third-world service and agricultural society to a second or first-world information-based society.<sup>54</sup> The Cuban people could therefore experience the same levels of such key health indicators as life expectancy, child mortality, or immunization as they did before the embargo, yet the blockade would constitute a separate violation of international law by inhibiting the country from developing up to its potential.<sup>55</sup>

The comprehensive unilateral trade sanctions regime imposed by the United States on Cuba specifically targets those aspects of the Cuban nation-state critical for national development.<sup>56</sup> While the contours of the right to development are still being defined in international discourse, there is a consensus on at least a few "pillars of development," including banking, telecommunications and technology, human resources, and infrastructure.<sup>57</sup> This list is certainly not all-inclusive, but it

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<sup>53</sup> See generally U.N. GAOR, 61st Sess., 50th plen. mtg., *supra* note 3, at 7–11; The Secretary-General, 2009, *supra* note 14, at 30–37.

<sup>54</sup> See U.N. GAOR, 61st Sess., 50th plen. mtg., *supra* note 3, at 7–11; The Secretary-General, 2009, *supra* note 14, at 30–37.

<sup>55</sup> See The Secretary-General, 2009, *supra* note 14, at 24–37; AMNESTY INT'L, *supra* note 4, at 16. Cuba's significant investment in its public health system has forestalled a major humanitarian disaster. See AMNESTY INT'L, *supra* note 4, at 16. The country has managed to blunt the negative impact of the embargo on the health of its people, for example, by increasing the per capita number of doctors (over twice as high as in the United States by 2001) and pursuing innovative healthcare strategies. See LINDA M. WHITEFORD & LAURENCE G. BRANCH, PRIMARY HEALTH CARE IN CUBA 41 (2008). In contrast, Cuba's ability to cope effectively with the blockade with respect to pursuing its economic development has been considerably more constrained. See The Secretary-General, 2009, *supra* note 14, at 24–37. In this sense, the infringement on Cuba's right to development, as a discrete breach of international law, may be even more serious than the violation related to the harm the embargo has wrought on the civilian population. See *id.* at 30–37.

<sup>56</sup> See The Secretary-General, 2009, *supra* note 14, at 28, 31, 32–34, 41, 97, 112; The Secretary-General, 2007, *supra* note 14, at 19, 27, 29, 38–39, 75, 78, 92, 98–99, 102; U.N. GAOR, 61st Sess., 50th plen. mtg., *supra* note 3, at 7–11.

<sup>57</sup> See Marks, *supra* note 20, at 141–42 (describing the range of opinions on what is encompassed in the right to development); see also U.S. AGENCY FOR INT'L DEV., SECURING THE FUTURE: A STRATEGY FOR ECONOMIC GROWTH 5, 13–14 (2008), available at [http://www.usaid.gov/our\\_work](http://www.usaid.gov/our_work) (follow "Economic Growth and Trade" hyperlink; then follow "Securing the Future: A Strategy for Economic Growth (April 2008)" hyperlink) (declaring that finance, infrastructure, and human resources are critical to enabling economic growth and avoiding distorted patterns of development); SENATE ECON. PLANNING OFFICE, SENATE OF THE PHIL., AN ECONOMIC AND SOCIAL DEVELOPMENT FRAMEWORK: FIVE PILLARS OF GROWTH 7–40

provides a basic framework, to which the United States government itself subscribes, for conceptualizing the form and process of development.<sup>58</sup> Because the U.S. embargo systematically undermines the integrity of Cuba's banking system and isolates it from the modern commercial world, impedes technological advancement, frustrates its ability to cultivate human capital, and obstructs the proper functioning of its infrastructure, it directly violates Cuba's right to development.<sup>59</sup>

By making it illegal for Cuba to trade in U.S. dollars and inhibiting its ability effectively to move money in the international banking system, the embargo precludes the country from accessing the capital necessary to develop.<sup>60</sup> For example, under the embargo, any bank subject to the jurisdiction of the United States (essentially any bank doing business in or with the United States) is forbidden from engaging in any transfer of credit or payment transaction with Cuba or a Cuban national.<sup>61</sup> As a result of such far-reaching, extraterritorial measures, Cuba not only has extreme difficulty meeting its financial obligations, but its ability to maintain a normal, properly-functioning banking sector is also severely

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(2004), available at <http://www.senate.gov.ph/publications/Five%20Pillars&20of%20Growth.pdf> (including, in its discussion of the factors necessary for development, a stable banking system, higher technological capacities, an educated and healthy workforce, and an efficient infrastructure).

<sup>58</sup> See U.S. AGENCY FOR INT'L DEV., *supra* note 57, at 5, 13–14; SENATE ECON. PLANNING OFFICE, *supra* note 57, at 7–40. It would be a hallow enterprise indeed to assert that states are entitled to development as a human right without concretely defining that right; yet there is no single, comprehensive, agreed upon schema for effecting development. See U.S. AGENCY FOR INT'L DEV., *supra* note 57, at 3–18; SENATE ECON. PLANNING OFFICE, *supra* note 57, at 7–40; Marks, *supra* note 20, at 141–42. Indeed, the United States remains so entrenched in its opposition to the right to development partly because of the all-encompassing manner in which it has been envisioned by other countries, particularly developing nations. See Marks, *supra* note 20, at 143–52. Circumscribing the conceptual outlines of the right to development according to the views of United States, therefore, undercuts any argument that the right sweeps too broadly and allows for a practical appraisal of the Cuban embargo vis-à-vis that framework. See U.S. AGENCY FOR INT'L DEV., *supra* note 57, at 3–18; Marks, *supra* note 20, at 143–52. For a more in-depth discussion of economic development in theory and practice, see generally JAMES M. CYPHER & JAMES L. DIETZ, *THE PROCESS OF ECONOMIC DEVELOPMENT* (2d ed. 2004) (providing a comprehensive overview of the concept of development in terms of history, theory, and practical application).

<sup>59</sup> See U.S. AGENCY FOR INT'L DEV., *supra* note 57, at 13–14; SENATE ECON. PLANNING OFFICE, *supra* note 57, at 7–40; The Secretary-General, 2009, *supra* note 14, at 28, 31, 32–34, 97, 112; The Secretary-General, 2007, *supra* note 14, at 27, 29, 38–39, 75, 78, 92, 98–99, 102; discussion *supra* Part II.

<sup>60</sup> See SENATE ECON. PLANNING OFFICE, *supra* note 57, at 7.

<sup>61</sup> See 31 C.F.R. § 515.201(a)(1) (2009).

diminished.<sup>62</sup> This has dire implications for Cuba's development prospects, as "[debt] and a weak financial and banking sector spoil [a] country's macroeconomy and serve as major constraints to higher growth."<sup>63</sup>

By barring access to technology, the embargo inhibits Cuba's ability to engage in the type of higher-order economic activities so critical to growth and development in the information-based global economy.<sup>64</sup> For example, the Cuban government and Cuban national companies are prohibited from purchasing products, components, technical equipment, or technical inputs that are under United States patents.<sup>65</sup> Cuba's inability to import various technologies has harmed sectors of its economy ranging from the poultry and agricultural industries to the research science and biotechnology industries.<sup>66</sup> The communications sector has likewise been damaged, highlighting the challenges posed to economic and social development when communications technologies are restricted.<sup>67</sup>

By restraining the ability of Cuban students to access information and engage in scholarly discourse, Cuba's ability to foster and fully utilize its human capital in the pursuit of economic growth is severely curtailed.<sup>68</sup> For example, Cuba's students, ranging from primary school to the university level, cannot access a variety of internet databases, web

<sup>62</sup> See *id.* § 515.201; The Secretary-General, 2009, *supra* note 14, at 31; The Secretary-General, 2007, *supra* note 14, at 38–39.

<sup>63</sup> See SENATE ECON. PLANNING OFFICE, *supra* note 57, at 7.

<sup>64</sup> See Manuel Castells, *Flows, Networks, and Identities: A Critical Theory of the Informal Society*, in GLOBALIZATION: CRITICAL CONCEPTS IN SOCIOLOGY 65, 72, 81 (Roland Robertson & Kathleen E. White eds., 2003) (declaring that a veritable "technology revolution" is underway wherein "the ability to use . . . information technologies [is] a fundamental tool of development," while the lack of such technological information capacity undermines a country's ability to develop).

<sup>65</sup> See The Secretary-General, 2009, *supra* note 14, at 25, 93; The Secretary-General, 2007, *supra* note 14, at 81. The United States is the most competitive and most diversified market for various technologies. See The Secretary-General, 2007, *supra* note 14, at 81. If Cuba is unable to obtain goods such as computers, software, and laboratory equipment from the United States, it is often the case that Cuba is foreclosed from obtaining these items entirely because they are too expensive to import from distant markets, do not exist outside the U.S. market, or are otherwise unavailable in Cuba because of licensing restrictions. See *id.* at 32, 36, 65, 81, 99.

<sup>66</sup> See The Secretary-General, 2009, *supra* note 14, at 28, 32–34; The Secretary-General, 2007, *supra* note 14, at 27, 75, 78.

<sup>67</sup> See The Secretary-General, 2009, *supra* note 14, at 34–36; The Secretary-General, 2007, *supra* note 14, at 89.

<sup>68</sup> See The Secretary-General, 2009, *supra* note 14, at 28–29; The Secretary-General, 2007, *supra* note 14, at 29; see also SENATE ECON. PLANNING OFFICE, *supra* note 57, at 31 (noting the importance of the education sector's contribution to development, specifically, "better educated or trained worker[s]").

pages, or scientific and technical journals and publications essential to the scholarly enterprise.<sup>69</sup> Nor do academics “have access to up-to-date works from United States writers or research and education centres.”<sup>70</sup> Moreover, without high-bandwidth internet lines and open access to internet resources, Cuba’s library system cannot effectively deliver information to the Cuban people, and information exchanges with scientific and academic networks in different countries is impeded.<sup>71</sup> Despite its heavy investment in education, Cuba is at risk of experiencing a shortage of well-educated, well-trained workers—a deficiency that can undermine and distort patterns of growth.<sup>72</sup>

By constraining its ability to import materials and technical knowledge, the embargo subverts the Cuban government’s efforts to create new infrastructure—a prerequisite to economic and industrial development.<sup>73</sup> A “stable supply of construction materials, tools and [technological] equipment” is necessary for infrastructural development; without such a supply, Cuba encounters great difficulties constructing and maintaining even the most basic projects such as human settlements.<sup>74</sup> The generally poor state of the Cuban infrastructure also severely limits the country’s capacity to trade, process food, distribute water, and produce agricultural goods.<sup>75</sup> A working infrastructure is “a key factor in a country’s economic development because it facilitates the movement of goods, services and people . . . [and] induce[s] economic activity.”<sup>76</sup>

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<sup>69</sup> See The Secretary-General, 2009, *supra* note 14, at 28; The Secretary-General, 2007, *supra* note 14, at 29, 92, 105. Students and researchers are not only restricted from accessing certain publications, but they are also prohibited from engaging, unimpeded, in the sort of academic collaboration so vital to advancements in scholarship. See The Secretary-General, 2009, *supra* note 14, at 105–06.

<sup>70</sup> The Secretary-General, 2009, *supra* note 14, at 28. Additionally, academics from Cuba regularly face significant obstacles to participation in international conferences due to the travel restrictions imposed by the embargo. See *id.* at 105–06. When conferences are held in the United States, Cuban scientists, economists, engineers, and healthcare specialists are banned entirely, thus preventing them from updating their training and knowledge in their respective fields and learning from the experiences of other specialists. See *id.* at 24–25, 90; The Secretary-General, 2007, *supra* note 14, at 29.

<sup>71</sup> See The Secretary-General, 2009, *supra* note 14, at 34, 105; The Secretary-General, 2007, *supra* note 14, at 29.

<sup>72</sup> See U.S. AGENCY FOR INT’L DEV., *supra* note 57, at 13; The Secretary-General, 2009, *supra* note 14, at 28–29.

<sup>73</sup> See SENATE ECON. PLANNING OFFICE, *supra* note 57, at 17; EDWARD J. BLAKELY & TED K. BRADSHAW, PLANNING LOCAL ECONOMIC DEVELOPMENT: THEORY AND PRACTICE 183 (3d ed. 2002) (discussing the necessity for infrastructural improvements in order to attract and facilitate industrial expansion).

<sup>74</sup> See The Secretary-General, 2007, *supra* note 14, at 98–99.

<sup>75</sup> See *id.* at 102.

<sup>76</sup> See SENATE ECON. PLANNING OFFICE, *supra* note 57, at 17.

The damage wrought on Cuba's infrastructure by the U.S. blockade makes it exceedingly more difficult, and in some instances impossible, to create the infrastructure essential for normal rates and patterns of growth, let alone the normal functioning of a society.<sup>77</sup>

Certainly, the impact of the embargo on Cuba's development implicates a variety of areas beyond banking, communications and technology, human capital, and infrastructure.<sup>78</sup> The United Nations Conference on Trade and Development touched on the depth and breadth of the embargo's effects—specifically with respect to Cuba's development—when the Secretary-General wrote,

[I]t is evident that the United States embargo has resulted in a substantial opportunity cost for Cuba and has impeded Cuba's efforts to integrate itself into the world trading system. This had an adverse impact on gross domestic product growth, export revenues, industrial and agricultural production, trade and social sectors such as food, health, education, communications, science and technology in Cuba. Moreover, the impact of the extraterritorial aspect of the United States embargo has had important implications for trade diversion and the business environment, given the significant involvement of United States interests in transnational corporations. Not only Cuban citizens but also those in third countries and in the United States are affected by the embargo in terms of the inability to interact with Cuba in the economic, academic and social fields.<sup>79</sup>

Such an understanding of the contours of the right to development is more expansive, and perhaps more nuanced, than that to which the United States adheres.<sup>80</sup> Nevertheless, if it is U.S. domestic law that is in conflict with the international legal right to development, it is necessary to view the embargo in light of the United States's limited concep-

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<sup>77</sup> See U.S. AGENCY FOR INT'L DEV., *supra* note 57, at 13–14; The Secretary-General, 2009, *supra* note 14, at 32–34, 112; The Secretary-General, 2007, *supra* note 14, at 98–99, 102.

<sup>78</sup> The Secretary-General, 2007, *supra* note 14, at 95.

<sup>79</sup> See *id.*

<sup>80</sup> See U.S. AGENCY FOR INT'L DEV., *supra* note 57, at 13–14; see also Marks, *supra* note 20, at 141–42 (noting the staunch opposition of the United States to an understanding of development that would consider such factors as “inequities in international trade, the negative impacts of globalization, differential access to technology [and] the crushing debt burden”).

tion.<sup>81</sup> The fact that the United States has recognized the importance of banking, communications and technology, human capital, and infrastructure to the meaningful growth and development of a state—areas of the Cuban nation that are thoroughly eroded by the embargo—demonstrates the illegality of the blockade even under the most restrictive understandings of development.<sup>82</sup>

#### IV. INTERNATIONAL LAW AND THE U.S. EMBARGO

The obstinacy of the United States in maintaining the Cuban blockade in the face of mounting, and ultimately near absolute international opposition, is one of the most egregious examples of such realpolitik in the history of the United Nations.<sup>83</sup> Beginning in 1992, at the request of Cuba, the U.N. General Assembly began voting annually on a resolution calling for the end of the U.S. embargo on Cuba.<sup>84</sup> The first vote, recorded in November 1992, was fifty-nine in favor, three opposed, with seventy-one abstentions.<sup>85</sup> Over the course of the next seventeen years, the vote shifted dramatically in favor of ending the embargo as the abstaining countries lined up to condemn the United States's policy toward Cuba.<sup>86</sup> In 2009, 187 countries voted to end the

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<sup>81</sup> See *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804). Conceptualizing the right to development more broadly will allow either Congress or the courts to avoid the constitutional question by construing the legislative enactments codifying the embargo narrowly, according to the *Charming Betsy* canon. See *id.* If the right to development is defined narrowly, however, under a rubric already recognized by the U.S. government, it is impossible to avoid the constitutional impasse. See *id.*

<sup>82</sup> See U.S. AGENCY FOR INT'L DEV., *supra* note 57, at 13–14. In outlining its “Framework for Economic Growth,” The U.S. Agency for International Development (“USAID”) conceives of telecommunications as a subset of infrastructure, which comprises one-third of the growth “enabler” equation (the other two enablers being finance and human resources). See *id.* According to USAID, the development enablers “cannot *by themselves* cause economic growth,” although it is clear that weak or missing enablers will have an adverse impact on development. See *id.*

<sup>83</sup> See U.N. GAOR, 64th Sess., 27th plen. mtg., *supra* note 3, at 22; see also U.N. GAOR, 63rd Sess., 33rd plen. mtg., *supra* note 3, at 20–21 (noting that, year after year, the arguments proffered by the United States in defense of its Cuban embargo are rejected by more states, but the United States is nevertheless able to flout the express will of the international community because of its economic strength).

<sup>84</sup> Letter from the Permanent Representative of Cuba to the United Nations to the Secretary-General, *supra* note 45.

<sup>85</sup> U.N. GAOR, 47th Sess., 70th plen. mtg. at 88, U.N. Doc. A/47/PV.70 (Dec. 9, 1992).

<sup>86</sup> See U.N. GAOR, 48th Sess., 48th plen. mtg. at 12, U.N. Doc. A/48/PV.48 (Nov. 3, 1993) (recording the 1993 vote as 88 in favor of ending the embargo, 4 against, with 57 abstentions); U.N. GAOR, 49th Sess., 45th plen. mtg. at 13–14, U.N. Doc. A/49/PV.45 (Oct. 26, 1994) (recording the 1994 vote as 101–2–48); U.N. GAOR, 50th Sess., 48th plen. mtg. at 17–18, U.N. Doc. A/50/PV.48 (Nov. 2, 1995) (recording the 1995 vote as 117–3–38); U.N.

embargo, with two countries abstaining.<sup>87</sup> The only two countries in the world to vote with the United States were Israel and Palau, and Israel openly violates the embargo contrary to its vote.<sup>88</sup>

Yet the United States's response to the consistent and vociferous indictments from the international community that its embargo of Cuba is in direct violation of international law, which has ranged from decidedly impassive to manifestly inflammatory, belies the relationship between U.S. and international law.<sup>89</sup> Not only is international law used as an interpretive mechanism for U.S. domestic law, but international law is and always has been a constituent part of U.S. law.<sup>90</sup>

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GAOR, 51st Sess., 57th plen. mtg. at 21–22, U.N. Doc. A/51/PV.57 (Nov. 12, 1996) (recording the 1996 vote as 137–3–25); U.N. GAOR, 52nd Sess., 45th plen. mtg. at 17, U.N. Doc. A/52/PV.45 (Nov. 5, 1997) (recording the 1997 vote as 143–3–17); U.N. GAOR, 53rd Sess., 37th plen. mtg. at 20, U.N. Doc. A/53/PV.37 (Oct. 14, 1998) (recording the 1998 vote as 157–2–12); U.N. GAOR, 54th Sess., 50th plen. mtg. at 19, U.N. Doc. A/54/PV.50 (Nov. 9, 1999) (recording the 1999 vote as 155–2–8); U.N. GAOR, 55th Sess., 56th plen. mtg. at 23–24, U.N. Doc. A/55/PV.56 (Nov. 9, 2000) (recording the 2000 vote as 167–3–4); U.N. GAOR, 56th Sess., 64th plen. mtg. at 19–20, U.N. Doc. A/56/PV.64 (Nov. 27, 2001) (recording the 2001 vote as 167–3–3); U.N. GAOR, 57th Sess., 48th plen. mtg. at 18, U.N. Doc. A/57/PV.48 (Nov. 12, 2002) (recording the 2002 vote as 173–3–4); U.N. GAOR, 58th Sess., 54th plen. mtg. at 18–19, U.N. Doc. A/58/PV.54 (Nov. 4, 2003) (recording the 2003 vote as 179–3–2); U.N. GAOR, 59th Sess., 44th plen. mtg. at 22, U.N. Doc. A/59/PV.44 (Oct. 28, 2004) (recording the 2004 vote as 179–4–1); U.N. GAOR, 60th Sess., 45th plen. mtg. at 24, U.N. Doc. A/60/PV.45 (Nov. 8, 2005) (recording the 2005 vote as 182–4–1); U.N. GAOR, 61st Sess., 50th plen. mtg., *supra* note 3, at 22 (recording the 2006 vote as 183–4–1); U.N. GAOR, 62nd Sess., 38th plen. mtg., *supra* note 3, at 18–19 (recording the 2007 vote as 184–4–1); U.N. GAOR, 63rd Sess., 33rd plen. mtg., *supra* note 3, at 22 (recording the 2008 vote as 185–3–2); U.N. GAOR, 64th Sess., 27th plen. mtg., *supra* note 3, at 22 (recording the 2009 vote as 187–3–2).

<sup>87</sup> U.N. GAOR, 64th Sess., 27th plen. mtg., *supra* note 3, at 22.

<sup>88</sup> See NOAM CHOMSKY, *ROGUE STATES: THE RULE OF FORCE IN WORLD AFFAIRS* 83 (2000).

<sup>89</sup> See, e.g., U.N. GAOR, 64th Sess., 27th plen. mtg., *supra* note 3, at 19–20; U.N. GAOR, 63rd Sess., 33rd plen. mtg., *supra* note 3, at 14–15; U.N. GAOR, 62nd Sess., 38th plen. mtg., *supra* note 3, at 18; U.N. GAOR, 61st Sess., 50th plen. mtg., *supra* note 3, at 6. In what has become an annual ritual, the United States will generally defend its blockade of Cuba first by halfheartedly declaring that it is a bilateral issue that should not be brought before the General Assembly, then provocatively attacking the Cuban government and blaming the humanitarian results of the embargo on its intransigence, and finally defending the virtues of its own conduct in the face of such obstinacy. See U.N. GAOR, 64th Sess., 27th plen. mtg., *supra* note 3, at 19–20; U.N. GAOR, 63rd Sess., 33rd plen. mtg., *supra* note 3, at 14–15; U.N. GAOR, 62nd Sess., 38th plen. mtg., *supra* note 3, at 18; U.N. GAOR, 61st Sess., 50th plen. mtg., *supra* note 3, at 6.

<sup>90</sup> See *Rasul v. Bush*, 542 U.S. 466, 484–85 (2004); *Johnson v. Eisentrager*, 339 U.S. 763, 776–77 (1950). The Supreme Court of the United States has invoked international law to interpret U.S. law in a number of cases, including *Johnson v. Eisentrager* and, more recently, *Rasul v. Bush*. See *Rasul*, 542 U.S. at 484–85; *Eisentrager*, 339 U.S. at 776–77. The Supreme Court has also stated unequivocally that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often



### A. *International Law Is U.S. Law*

By virtue of the Supremacy Clause, international law codified in treaties is elevated to a status, together with federal statutes and the Constitution itself, of "the supreme Law of the Land."<sup>91</sup> Moreover, nothing in this constitutional mandate requires that customary international law be subordinated to treaties.<sup>92</sup> If both treaties and customary international law constitute binding international obligations of the United States, it is sound, both logically and constitutionally, to treat them as coordinate forms of law.<sup>93</sup> Thus, both treaties and customary international law are subject to the same principles when a conflict exists between the United States's international commitments and domestic legislation.<sup>94</sup>

If the Constitution does not preclude the elevation of customary international law to the level of treaties or domestic enactments in theory, then practice has borne this out—the U.S. legal system has long accorded great respect, and deference, to the "law of nations."<sup>95</sup> As the Supreme Court noted in 1796, "[w]hen the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."<sup>96</sup> The Founders expected

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as questions of right depending on it are duly presented for their determination." The *Paquete Habana*, 175 U.S. 677, 700 (1900); see also Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561–62 (1984) (discussing the historical convergence of international law and U.S. law and the manner in which the relationship between the two co-equal forms has evolved).

<sup>91</sup> U.S. CONST. art. VI, cl. 2. ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . .").

<sup>92</sup> See Henkin, *supra* note 7, at 877.

<sup>93</sup> See *id.* at 877–78.

<sup>94</sup> See *id.* at 878 ("If an act of Congress can modify customary law for domestic purposes, it is . . . because, like treaties, customary law is equal in status to legislation, and the more recent of the two governs.").

<sup>95</sup> See Ryan Goodman & Derek P. Jinks, Note, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 464 (1997) ("As new members in the community of nations, the Founders felt bound, both ethically and pragmatically, to inherit and abide by the law of nations.").

<sup>96</sup> *Ware v. Hylton*, 3 U.S. (1 Dall.) 199, 281 (1796); see also *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 161 (1795) (stating "this is so palpable a violation of our own law . . . of which the law of nations is a part, as it subsisted either before the act of Congress on the subject, or since"); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793) (holding "the United States had . . . become amenable to the laws of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed"); 1 Op. Att'y Gen. 26, 27 (1792) (concluding "the law of nations, although not specifically adopted . . . is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation").

that the customary law of nations would find application in U.S. courts by virtue of the nation's membership in the international community; moreover, they unquestionably intended this outcome.<sup>97</sup> Early jurisprudence reflected this intent.<sup>98</sup> In the time since the nation's founding, the incorporation of international law into both federal and state law has continued unabated, with scholars, commentators, and jurists reiterating the propriety of such developments.<sup>99</sup> Cases arising under international law or international agreements to which the United States has acquiesced are within the jurisdiction of U.S. courts.<sup>100</sup> These courts "are bound to give effect to international law."<sup>101</sup> Similarly, "[c]ases arising under treaties to which the United States is a party, as well as cases arising under customary international law" are "within the Judicial Power of the United States under Article III, Section 2 of the Constitution."<sup>102</sup>

### B. *The U.S. Embargo Contravenes International Law*

The overwhelming weight of research and scholarly discourse on the subject of the U.S. embargo of Cuba has exposed a very damning pattern of behavior on the part of the United States.<sup>103</sup> By the standards

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<sup>97</sup> See Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 MICH. J. INT'L L. 301, 301 (1999) ("The Founders clearly expected that the customary law of nations was binding, was supreme law, created (among others) private rights and duties, and would be applicable in United States federal courts.").

<sup>98</sup> See, e.g., *The Paquete Habana*, 175 U.S. at 700 ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . .").

<sup>99</sup> See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (declaring that "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today," and then applying those principles to provide federal courts with jurisdiction to adjudicate rights "already recognized by international law"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 111(1) (1987) (noting that "[i]nternational law and international agreements are law of the United States and supreme over the law of the several States"); see also Goodman & Jinks, *supra* note 95, at 466 (identifying a wide range of adherents to the notion that customary international law has legal effect in the United States, including a number of federal courts, the executive, the American Law Institute, and the American Bar Association). But see *Medellin v. Texas*, 552 U.S. 491, 522–23 (2008) (refusing to create, based on the international obligations of the United States to comply with judgments of the International Court of Justice, automatically-binding domestic law in the absence of enabling legislation).

<sup>100</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 111(1) (1987). Moreover, the President has the obligation and authority to make sure that international law is faithfully executed within the boundaries of this nation. See *id.* § 111 cmt. c.

<sup>101</sup> See *id.* § 111(2), (3).

<sup>102</sup> *Id.* § 111 cmt. c.

<sup>103</sup> See AMNESTY INT'L, *supra* note 4, at 13–19.

of nearly every government in the world except the United States, the comprehensive embargo on Cuba incontrovertibly violates international human rights law and international humanitarian law due to its devastating humanitarian impact.<sup>104</sup> In reality, the views of the world community and those of the United States may not be as far apart as commentators might suggest. The government does continue to argue publicly that its conduct is wholly consistent with international law.<sup>105</sup> Recent modifications to the embargo undertaken for "humanitarian reasons," however, undercut this position.<sup>106</sup> At least with respect to the embargo's humanitarian consequences, there is evidence the United States appreciates that its embargo may violate certain international legal norms.<sup>107</sup>

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<sup>104</sup> See generally U.N. GAOR, 61st Sess., 50th plen. mtg., *supra* note 3 (documenting the statements of governments on the subject of the Cuban embargo). The comments of the South African delegate, speaking on behalf of the Group of 77 and China on the subject of the embargo imposed by the United States against Cuba, are paradigmatic of the views generally held and expressed by the international community to describe the embargo in recent years:

[The] long-standing economic, commercial and financial embargo [of Cuba] has been consistently rejected by a growing number of Member States to the point at which the opposition has become almost unanimous. Thus, the need to respect international law in the conduct of international relations has been recognized by most members of this body, as has been evidenced by the growing support for the draft resolution [condemning the embargo] . . . I believe that the presence of such a large number of Member States in this Hall today and their participation in these deliberations are indications of their opposition to unilateral extraterritorial measures. They express their firm opposition to unilateral measures as a means of exerting pressure on developing countries, as such measures are contrary to international law, international humanitarian law, the United Nations Charter and the norms and principles governing peaceful relations among States.

*Id.* at 2.

<sup>105</sup> See *id.* at 6.

<sup>106</sup> See *supra* notes 3, 4 and accompanying text.

<sup>107</sup> See, e.g., U.N. GAOR, 61st Sess., 50th plen. mtg., *supra* note 3, at 6. When defending its conduct as consistent with international law, the U.S. government generally attempts to avoid blame for the humanitarian crisis in Cuba through two key arguments supporting its legality. See 22 U.S.C. §§ 6002, 6022 (2006); U.N. GAOR, 61st Sess., 50th plen. mtg., *supra* note 3, at 6. First, the United States blames the Cuban government for its failure to respect the political freedoms, associational rights, and economic liberties of its people. See, e.g., 22 U.S.C. §§ 6002, 6022; U.N. GAOR, 64th Sess., 27th plen. mtg., *supra* note 3, at 19–20; U.N. GAOR, 63rd Sess., 33rd plen. mtg., *supra* note 3, at 14–15; U.N. GAOR, 62nd Sess., 38th plen. mtg., *supra* note 3, at 18; U.N. GAOR, 61st Sess., 50th plen. mtg., *supra* note 3, at 6. Second, at least in recent years, the government points to the "humanitarian" efforts it has undertaken in connection with the embargo. See U.N. GAOR, 64th Sess., 27th plen. mtg., *supra* note 3, at 19–20; U.N. GAOR, 63rd Sess., 33rd plen. mtg., *supra* note 3, at 14–15; U.N. GAOR, 62nd Sess., 38th plen. mtg., *supra* note 3, at 18; U.N. GAOR, 61st Sess., 50th

Yet, the international community's efforts to impel the United States to lift its embargo for humanitarian reasons, and the United States's efforts to minimize the humanitarian impact of the embargo, have only addressed violations of a discrete set of international legal norms.<sup>108</sup> Even if the United States were somehow able to mitigate, or eliminate entirely, the ruinous consequences the embargo has on the Cuban people, such a comprehensive embargo would nevertheless be illegal under international law.<sup>109</sup> In other words, the illegality of such measures under international law is not simply predicated on its effect on the Cuban people on a micro-level—it also is established by reference to the nation-state itself and the macro-level concept of development.<sup>110</sup>

Because the embargo of the Cuban nation completely inhibits the country's ability to pass from a third-world service and agricultural economy to more advanced stages of development, it violates international law to which the United States is bound by both treaty and custom.<sup>111</sup> First and foremost among such violations has been the abroga-

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plen. mtg., *supra* note 3, at 6. In other words, the United States argues that its embargo would be illegal only if the humanitarian devastation were caused by the United States and not Cuba, and even if the United States is the cause of the ill effects, the measures it has taken to mitigate those effects absolve it of responsibility under international law. *See* U.N. GAOR, 64th Sess., 27th plen. mtg., *supra* note 3, at 19–20; U.N. GAOR, 63rd Sess., 33rd plen. mtg., *supra* note 3, at 14–15; U.N. GAOR, 62nd Sess., 38th plen. mtg., *supra* note 3, at 18; U.N. GAOR, 61st Sess., 50th plen. mtg., *supra* note 3, at 6. The mere fact the United States engages in this debate, however, is evidence that it is at least cognizant of the potential violations of international legal norms implicated by its conduct. *See* U.N. GAOR, 64th Sess., 27th plen. mtg., *supra* note 3, at 19–20; U.N. GAOR, 63rd Sess., 33rd plen. mtg., *supra* note 3, at 14–15; U.N. GAOR, 62nd Sess., 38th plen. mtg., *supra* note 3, at 18; U.N. GAOR, 61st Sess., 50th plen. mtg., *supra* note 3, at 6.

<sup>108</sup> *See generally* U.N. GAOR, 64th Sess., 27th plen. mtg., *supra* note 3; U.N. GAOR, 63rd Sess., 33rd plen. mtg., *supra* note 3; U.N. GAOR, 62nd Sess., 38th plen. mtg., *supra* note 3; U.N. GAOR, 61st Sess., 50th plen. mtg., *supra* note 3. Countries regularly condemn the United States for a number of separate violations of international law; yet, when the United States defends its embargo as consistent with international legal principles, it neglects to address the claimed violation of Cuba's right to development. *See* U.N. GAOR, 64th Sess., 27th plen. mtg., *supra* note 3, at 19–20; U.N. GAOR, 63rd Sess., 33rd plen. mtg., *supra* note 3, at 14–15; U.N. GAOR, 62nd Sess., 38th plen. mtg., *supra* note 3, at 18; U.N. GAOR, 61st Sess., 50th plen. mtg., *supra* note 3, at 6.

<sup>109</sup> *See* Marks, *supra* note 20, at 138.

<sup>110</sup> *See id.*; *see also* U.N. Charter arts. 55–56 (pledging co-operation among U.N. member states to promote "conditions of economic and social" advantage).

<sup>111</sup> *See* U.N. Charter arts. 55–56; Universal Declaration of Human Rights, *supra* note 6, art. 28; International Covenant on Civil and Political Rights, *supra* note 6, art. 1; International Covenant on Economic, Social and Cultural Rights, *supra* note 6, art. 1; The Secretary-General, 2009, *supra* note 14, at 28, 31, 32–34, 97, 112; The Secretary-General, 2007, *supra* note 14, at 27, 29, 38–39, 75, 78, 92, 98–99, 102; discussion *supra* Part II. A treaty is binding on the United States, that is, the United States must comply with the obligations

tion of its duties under the Charter of the United Nations.<sup>112</sup> Having signed the International Covenant on Economic, Social and Cultural Rights as well as signed and ratified the International Covenant on Civil and Political Rights, the United States has further breached its international obligations codified in treaties.<sup>113</sup> While the United States has resisted the codification of the right to development in more specific instruments and the evolution of the right into a legitimate norm of international law, its often sole opposition to the right has not prevented it from becoming customary international law binding on the United States.<sup>114</sup>

#### V. CONSTITUTIONALIZING THE EMBARGO: EXECUTIVE, LEGISLATIVE, AND JUDICIAL RESPONSIBILITIES

Although international law is a constituent element of U.S. law, the attitudes of the bodies charged with preserving that close relationship have, at various times throughout the nation's history, run the gamut between deferential and derisive, complimentary and contentious.<sup>115</sup> On the one hand, the judiciary, the executive, and the legislative

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set forth in the instrument, when "the United States has consented to be bound by that agreement," and the agreement has "entered into force." See *Avero Belg. Ins. v. Am. Airlines, Inc.*, 423 F.3d 73, 77 (2d Cir. 1995). Although signing a treaty was once sufficient as a manifestation of consent to be bound, modern U.S. practice has deviated from this custom. See Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L.J. 307, 313 (2007). The United States must also "ratify" a treaty, which generally refers to the process by which the Senate "consent[s] to a treaty that has been sent to the Senate by the President for legislative consideration" before the President officially ratifies the instrument. *Avero Belg. Ins.*, 423 F.3d at 78. While the process by which norms of customary international law become binding on a state is less well-defined, the right to development has certainly risen to the level of customary international law and become binding on the United States. See discussion *supra* Part II.

<sup>112</sup> See U.N. Charter arts. 55–56. After President Harry S. Truman signed the U.N. Charter on June 26, 1945, he submitted it to the Senate for its advice and consent. 91 CONG. REC. 7118–19 (1945). The Senate consented to ratification of the Charter by a vote of 89 to 2, and President Truman then officially ratified the Charter on August 8, 1945. S.J. Res. 144, 80th Cong., 61 Stat. 756 (1947) (enacted); 91 CONG. REC. 8189–8190 (1945).

<sup>113</sup> See *supra* notes 36–42 and accompanying text.

<sup>114</sup> See discussion *supra* Part II.

<sup>115</sup> See *Medellin v. Texas*, 552 U.S. 491, 522–23 (2008); *The Paquete Habana*, 175 U.S. 677, 700 (1900); see also JAMES B. STAAB, *THE POLITICAL THOUGHT OF JUSTICE ANTONIN SCALIA: A HAMILTONIAN ON THE SUPREME COURT* 214–15 (2006) (describing a heated debate between Justice Antonin Scalia and Justice Stephen Breyer on the role of international law in U.S. constitutional interpretation); Jesse S. Reeves, *The Jones Act and the Denunciation of Treaties*, 15 AM. J. INT'L L. 33, 35 (noting that Congress has, at times during the nation's history, "legislated in the face of international obligations").

branches are required to give force to international law.<sup>116</sup> On the other hand, both the executive and legislative branches of the U.S. government may act in violation of a treaty or customary international law.<sup>117</sup> The Supreme Court has also recognized a distinction between treaties that “automatically have effect as domestic law” and are “equivalent to an act of the legislature,” and those that “do not by themselves function as binding federal law” and require an additional congressional enactment to give them force.<sup>118</sup>

As a matter of domestic law, it is clear the United States may disavow or ignore its obligations under international law.<sup>119</sup> This principle does not extend to the international arena—failure to give domestic effect to international legal commitments does not absolve the United States of those obligations on the international level.<sup>120</sup> With respect to both treaty obligations and international legal norms that have risen to the level of customary international law, then, the United States is bound to follow international law or risk defaulting on its obligations as a member of the international community.<sup>121</sup> In the absence of meaningful enforcement mechanisms, this does not seem particularly prob-

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<sup>116</sup> See U.S. CONST. art. VI, cl. 2.; LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 198–202 (2d ed. 1996) (describing congressional declarations carving out exceptions or expressing reservations to international instruments as “anti-Constitutional” in spirit and highly problematic as a matter of law”).

<sup>117</sup> Glennon, *supra* note 8, at 325.

<sup>118</sup> See *Medellin*, 552 U.S. at 504–05.

<sup>119</sup> See Glennon, *supra* note 8, at 325; see also *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (stating that if “Congress has made its intent in the statute clear, [a court] must give effect to that intent”) (internal quotations omitted).

<sup>120</sup> See *Medellin*, 552 U.S. at 504–05, 522–23. Although the Supreme Court held in *Medellin v. Texas* that a non-self-executing treaty does not create enforceable rights in U.S. courts, implicit in the decision was the notion that the absence of automatic domestic legal effect does not render an international obligation any less binding vis-à-vis the world community. See *id.*; see also *Xuncax v. Gramajo*, 886 F. Supp. 162, 180 n.21 (1995) (positing that, while individual nations may be left to fashion specific domestic legal remedies for a cause of action, countries still have a duty to redress international law violations). Signed and ratified treaties “comprise international commitments” even if the treaty itself does not give rise to domestically-enforceable federal law. See *Medellin*, 552 U.S. at 505. Moreover, a state party to a non-self-executing treaty must “implement it promptly, and failure to do so would render [the state] in default under its treaty obligations.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 111, rep. n.5 (1987). Whether the rights or obligations under the treaty can be sued upon in domestic courts is, therefore, an issue distinguishable from whether the state party to the treaty is fulfilling its obligations under international law. See *id.* § 115(1)(b).

<sup>121</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 115(1)(b) (1987) (“That a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation.”).

lematic.<sup>122</sup> So much more is at stake, though—if the United States wishes to use international legal mechanisms to pursue its interests, it must demonstrate to the world that it takes international law seriously within the constitutional framework.<sup>123</sup> Especially in the context of the Cuban embargo, where U.S. federal law is in direct conflict with international law, the United States must accord adequate respect for the latter and take steps to resolve the tension.<sup>124</sup> In order to accomplish this, each branch of government—executive, legislative, and judicial—has a role to play.<sup>125</sup>

The judiciary possesses the constitutional authority to overturn the Cuban embargo as unconstitutional by virtue of its departure from the law of nations.<sup>126</sup> The embargo presents a very clear question of statutory and constitutional interpretation, specifically, whether the trade blockade imposed on Cuba and codified in U.S. law directly conflicts with the right to development as it is described in international instruments to which the United States is a party, or as it is framed as a norm of customary international law to which the United States is bound.<sup>127</sup>

Nevertheless, courts regularly refuse to reach the merits of claims relating to the blockade of Cuba at all, asserting that they present non-

<sup>122</sup> See Eric A. Posner, *International Law and the Disaggregated State*, 32 FLA. ST. U. L. REV. 797, 798 (2005) (describing the “realist” approach to international law as subscribing to the view that “states follow their interests come what may”).

<sup>123</sup> See *id.* at 799–800.

<sup>124</sup> See *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

<sup>125</sup> See *infra* notes 126, 134, 139 and accompanying text.

<sup>126</sup> See *The Paquete Habana*, 175 U.S. 677, 700 (1900). If international law is U.S. law by virtue of the Supremacy Clause, and it is the “duty of the judicial department to say what the law is,” then it is clearly within the Court’s authority to rule on questions of international law. See *id.*; *Marbury v. Madison*, 5 U.S. 137, 177 (1803). See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 111(2), (3) (1987) (noting that cases arising under international law or international agreements to which the United States has acquiesced are within the jurisdiction of U.S. courts).

<sup>127</sup> See *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 229–30 (1986). When faced with a legal question of statutory interpretation touching on international law, the Supreme Court has held:

[I]t is “error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”

...

[T]he courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts. . . . [U]nder the Constitution, one of the Judiciary’s characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.

*Id.* at 229–30 (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1969)).

justiciable political questions.<sup>128</sup> Where courts have addressed the constitutional questions posed by the international legal implications of the embargo, they have either 1) ruled purely on domestic legal grounds, or 2) found no direct conflict with international law.<sup>129</sup> To date, no court has ruled on whether Cuba's right to development, protected under customary international law, would render any aspect of the Cuban embargo postdating the development of this norm unconstitutional.<sup>130</sup> If the judiciary is ever asked to rule on the conflict between Cuba's right to development and most, if not all, the provisions of the embargo, it should not shy away from its constitutional duty to invalidate the provisions in question.<sup>131</sup> In light of the powerful currents of judicial restraint that have guided courts' rulings on the subject to date, however, a sweeping judicial invalidation of a half-century of foreign policy is unlikely.<sup>132</sup> Consequently, the task of bringing U.S. foreign policy toward Cuba in accord with international legal norms is, in all practicality, left to the political branches.<sup>133</sup>

The executive possesses significant authority to alter the nature of the embargo such that it does not completely undermine Cuba's right

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<sup>128</sup> See, e.g., *Regan v. Wald*, 468 U.S. 222, 242 (1984) (declining to hear the claim that Cuban embargo no longer implicated the national security concerns sufficient to justify its continued existence); *Sardino v. Fed. Reserve Bank*, 361 F.2d 106, 112 (2d Cir. 1966) (declining to consider claim that nature of Cuba's foreign policy did not justify regulations freezing Cuban assets).

<sup>129</sup> See *Charming Betsy*, 6 U.S. at 118 ("[A]n Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."). The approach followed by the court in *Freedom to Travel Campaign v. Newcomb* is paradigmatic of the judiciary's general reluctance to strike down federal law as incompatible with international law. See 82 F.3d 1431, 1438–41 (9th Cir. 1996). In ruling on the constitutionality of the Cuban Asset Control Regulations, the court focused mainly on domestic constitutional implications, holding that the Regulations are neither an unconstitutional delegation of congressional authority nor unconstitutionally vague under the Fifth and First Amendments. See *id.* at 1438, 1440. To the extent the court was forced to address the embargo's constitutionality in light of international law, the court summarily rejected the argument that any conflict between the two existed. See *id.* at 1441–42.

<sup>130</sup> See *Charming Betsy*, 6 U.S. at 118, 119; Marks, *supra* note 20, at 142, 167. Indeed the United States has not formally recognized that the right development has matured into a legitimate norm of customary international law; thus no court would have occasion to rule on the relationship of the Cuban embargo to that norm. See *Charming Betsy*, 6 U.S. at 118, 119; Marks, *supra* note 20, at 142, 167.

<sup>131</sup> See *Japan Whaling Ass'n*, 478 U.S. at 229–30. Until Congress passes new legislation which explicitly and unequivocally demonstrates an intent to disregard the right to development, the provisions of the embargo on Cuba bearing on its development remain unconstitutional. See *Charming Betsy*, 6 U.S. at 118.

<sup>132</sup> See *Regan*, 468 U.S. at 242; *Sardino*, 361 F.2d at 112.

<sup>133</sup> See *Regan*, 468 U.S. at 242; *Sardino*, 361 F.2d at 112.



to development.<sup>134</sup> President Obama has already taken some positive steps toward compliance with international law, easing some of the restrictions on remittances and travel restrictions for Cuban-Americans with relatives in Cuba.<sup>135</sup> The steps taken exhibit the same fundamental deficiency of past actions with respect to easing the embargo, however, in that they focus almost exclusively on the humanitarian impact and largely ignore the development issue.<sup>136</sup> With respect to Cuba's capacity for development, the most debilitating components of the Federal Regulations promulgated by the executive remain in force.<sup>137</sup> By renewing his TWEA powers in September 2009, President Obama has ensured Cuba's vulnerability for at least another year.<sup>138</sup>

Congress's capacity to bring the embargo on Cuba back onto sound constitutional footing, by ensuring its conformity with international law, far exceeds that of the other branches.<sup>139</sup> While the regulations promulgated by the executive certainly play a significant role in stifling economic development in Cuba, the president's authority to carry out the embargo is derived entirely from legislative enactments.<sup>140</sup> Likewise, the judiciary is limited in its ability to alter fundamentally the nature of U.S. policy toward Cuba both by its own prudential concerns about non-justiciable political questions and the constitutional constraints on jurisdiction.<sup>141</sup> For both constitutional and practical reasons, then, the prospective constitutionality of the embargo rests in the hands of Congress.<sup>142</sup>

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<sup>134</sup> See 22 U.S.C. § 2370(a)(1) (2006); 50 U.S.C. app. § 5(b) (2006). Pursuant to the President's expansive powers with respect to the Cuban embargo, he may repeal or otherwise alter the Federal Regulations if certain conditions are met. See 31 C.F.R. pt. 515 (2009). Thus, it is within the executive's power to eliminate those aspects of the embargo that currently have a direct and substantial negative impact on Cuba's development. See *id.*; AMNESTY INT'L, *supra* note 4.

<sup>135</sup> See Neil MacFarquhar, *U.S. Embargo on Cuba Again Finds Scant Support at U.N.*, N.Y. TIMES, Oct. 29, 2009, at A8.

<sup>136</sup> See 22 U.S.C. § 7202 (facilitating Cuba's importation of agricultural products and medical supplies but failing to accommodate Cuba's need for materials necessary for the development of infrastructure and industry).

<sup>137</sup> See 31 C.F.R. pt. 515.

<sup>138</sup> See MacFarquhar, *supra* note 135.

<sup>139</sup> See Brest, *supra* note 9, at 61–65 (discussing Congress's capacity to engage in constitutionalism and the need for such engagement where, for example, judicial review has been foreclosed).

<sup>140</sup> See 22 U.S.C. § 2370(a)(1); 50 U.S.C. app. § 5(b) (2006).

<sup>141</sup> See U.S. CONST. art. III, § 2, cl. 1. If an argument that the embargo on Cuba undermines its right to development does not reach an Article III court in the context of a case or controversy, the judiciary will never have an opportunity to pass on the constitutionality of the embargo. See *id.*

<sup>142</sup> See Brest, *supra* note 9, at 63–65.

Especially in situations where, as here, congress is the only branch of government practically capable of upholding the Constitution, it cannot shirk this solemn responsibility.<sup>143</sup> If the ultimate goal is to “constitutionalize” what is otherwise a constitutionally impermissible breach of international law, Congress has two options, both of which require a genuine appreciation for the role of international law in the constitutional framework.<sup>144</sup>

Congress’s first option involves duly recognizing the right to development as a legitimate norm of international law, conceding that the right conflicts directly with federal law, and resolving the conflict by passing new legislation unequivocally rejecting the norm under the *Charming Betsy* canon.<sup>145</sup> Where, as here, the development of an international legal norm postdates a federal legislative enactment, that rule requires a clear statement from Congress that it specifically intends to contravene an international legal norm.<sup>146</sup> Under this approach, Congress could simply pass new legislation as or even more harmful to Cuban development as long as it explicitly recognizes the right to development as an international legal norm and provides a clear legislative mandate to repeal that norm.<sup>147</sup> Certainly, a newly-codified embargo would still violate international law, but the constitutional tension between these co-equal forms of law would be resolved, by reference to the timing and language of the enactment, in favor of the new legislation.<sup>148</sup>

Contrastingly, Congress may, out of respect for the views of every single nation in the world (except Israel and Palau) and concomitant appreciation of the role the Founders wished international law to play in our legal system, repeal the legislation creating the embargo.<sup>149</sup> The

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<sup>143</sup> See *id.* at 63.

<sup>144</sup> See Henkin, *supra* note 7, at 877–78.

<sup>145</sup> See *Charming Betsy*, 6 U.S. at 118, 119; see also *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (holding that if a treaty and a federal statute conflict, “the one last in date will control the other”); Henkin, *supra* note 7, at 877–78 (explaining that customary international law and treaties are both on equal footing with legislative enactments and thus subject to the “last in time” rule).

<sup>146</sup> See *Charming Betsy*, 6 U.S. at 119.

<sup>147</sup> See, e.g., *Zadvydas*, 533 U.S. at 696 (stating where congressional intent is clear, courts will resolve constitutional tensions in favor of that intent); *I.N.S. v. St. Cyr*, 533 U.S. 289, 315–16 (2001) (holding Congress may enact ex post facto law as long as it provides a clear statement).

<sup>148</sup> See *Whitney*, 124 U.S. at 194; *Charming Betsy*, 6 U.S. at 119; Henkin, *supra* note 7, at 877–78.

<sup>149</sup> See THE FEDERALIST NO. 80 (Alexander Hamilton) (stating that all members of the world community, of which the United States was a part upon independence, are reciprocally “answerable to foreign powers”); see also *Maria v. McElroy*, 68 F. Supp. 2d 206, 231 (E.D.N.Y. 1999).

economic blockade of Cuba represents one of the most egregious violations of international law in modern statecraft.<sup>150</sup> The United States cannot violate international law with impunity and then attempt to avail itself of international legal mechanisms for redress of perceived wrongs to itself or its citizens; neither can it compel compliance with international law by other states.<sup>151</sup> Although it is critical, as a matter of domestic law, to constitutionalize the embargo, simply recodifying it and explicitly stating an intention to violate Cuba's right to development can only further damage the United States's standing in the community of nations.<sup>152</sup> Thus, if the United States is to accord the appropriate respect for international law and thereby maintain its position of global leadership, especially on issues of fundamental rights and liberties, Congress must end the embargo on Cuba.<sup>153</sup>

### CONCLUSION

When the Obama administration took office, it entered the debate on Cuba and the nearly half-century old embargo that has crippled the tiny island nation with a self-avowed respect for the law of nations. Despite easing some restrictions on the ability of Cuban-Americans with family in Cuba to travel and send remittances, the President's promises on Cuba have gone largely unfulfilled. The Cuban embargo, in its current form, remains a constitutionally impermissible violation of international law, specifically, the international legal norm prohibiting interference with a nation's right to develop.

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<sup>150</sup> See generally The Secretary-General, 2009, *supra* note 14 (documenting the ire of the international community with respect to the Cuban embargo). No other modern act of state has provoked such widespread, unanimous condemnation by the international community. See CHOMSKY, *supra* note 88, at 83 (noting that the United States is "100 percent isolated" in its stance toward Cuba, and further that Israel—the only country that purportedly supports the U.S. position—regularly violates the embargo).

<sup>151</sup> See Joseph Kahn, *In Response, China Attacks U.S. Record on Rights*, N.Y. TIMES, Mar. 10, 2006, at A12. Other countries have taken notice of U.S. violations. See *id.* For example, in response to the State Department's annual report on human rights conditions globally, the Chinese government responded, "As in previous years, the State Department pointed the finger at human rights situations in more than 190 countries and regions, including China, but kept silent on the serious violations of human rights in the United States." *Id.* Cuba has similarly questioned whether the United States has any legitimate claim to "moral authority" with respect to enforcing human rights norms when it regularly disregards such norms. See U.N. GAOR, 61st Sess., 50th plen. mtg., *supra* note 3, at 11.

<sup>152</sup> See *Medellin*, 552 U.S. at 504–05, 522–23; *Whitney*, 124 U.S. at 194; *Charming Betsy*, 6 U.S. at 119; Henkin, *supra* note 7, at 877–78; *supra* note 149 and accompanying text.

<sup>153</sup> See Posner, *supra* note 122, at 842.

Although both the executive and the judiciary can play a role in constitutionalizing the blockade, it is the U.S. Congress that possesses the greatest power to square federal enactments with international law. The legislature can accomplish this either by passing new legislation stating the United States's intentions to flout international legal norms, or repealing altogether the legislative enactments giving force to the embargo. If the United States values its reputation as an advocate of human rights and the rule of law in the international sphere, the choice between these two options is obvious.

